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ARKANSAS CODE OF 1987 ANNOTATED



VOLUME 7B 2012 Replacement TITLE 11: LABOR AND INDUSTRIAL RELATIONS (CHAPTERS 8-14)

Prepared by the Editorial Staff of the Publisher

Under the Direction and Supervision of the
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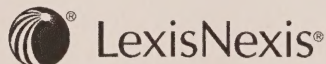
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Sources

This volume contains legislation enacted by the Arkansas General Assembly through the 2012 Fiscal Session. Annotations are to the following sources:

Arkansas Supreme Court and Arkansas Court of Appeals Opinions through 2012 Ark. LEXIS 146 (March 15, 2012) and 2012 Ark. App. LEXIS 324 (March 14, 2012).

Federal Supplement through February 22, 2012.

Federal Reporter 3d Series through February 22, 2012.

United States Supreme Court Reports through February 22, 2012.

Bankruptcy Reporter through February 22, 2012.

Arkansas Law Notes through the 2008 Edition.

Arkansas Law Review through Volume 61, p. 787.

University of Arkansas at Little Rock Law Review through Volume 30, p. 267.

ALR 6th through Volume 64, p. 655.

ALR Fed. 2d through Volume 46, p. 473.

Titles of the Arkansas Code

1. General Provisions
2. Agriculture
3. Alcoholic Beverages
4. Business and Commercial Law
5. Criminal Offenses
6. Education
7. Elections
8. Environmental Law
9. Family Law
10. General Assembly
11. Labor and Industrial Relations
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23. Public Utilities and Regulated Industries
24. Retirement and Pensions
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User's Guide

Differences in language, subsection order, punctuation, and other variations in the statute text from legislative acts, supplement pamphlets, and previous versions of the bound volume, are editorial changes made at the direction of the Arkansas Code Revision Commission pursuant to the authority granted in § 1-2-303.

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of the bound Volume 1 of the Code.

1. WORKING CONDITIONS GENERALLY
2. CHILD LABOR
3. REGULATION OF SITES
4. INJURY OR DEATH OF EMPLOYEES GENERALLY
5. WORKERS COMPENSATION
6. DEPARTMENT OF WORKFORCE SERVICES LAW
7. EMPLOYMENT OFFICES AND SITES
8. EMPLOYMENT OF CHILDREN IN AN OVERSEAS PROPERTY
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INJURY OR DEATH OF EMPLOYEES GENERALLY

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Publisher's Note. The publisher of this chapter may be contacted at the Workers Compensation Law § 11-410, et seq., with regard to requests printed by that chapter.

Effective Dates. Act 1977, No. 33, § 1, effective on passage.

Act 1978, No. 173, § 2, approved Mar. 13, 1978. Subsequently amended.

This act being necessary for the health and preservation of the public health and safety of the State, the Senate shall take effect and have force and effect as follows:

Act 1977, No. 33, § 1, approved Mar. 24, 1977. Subsequently amended.

TITLE 11

LABOR AND INDUSTRIAL RELATIONS

(CHAPTERS 1-7 IN VOLUME 7A)

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INJURY OR DEATH OF EMPLOYEES GENERALLY

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Publisher's Notes. The provisions of this chapter may be superseded by the Workers' Compensation Law, § 11-9-101 et seq., with respect to employees covered by that chapter.

Effective Dates. Acts 1907, No. 69, § 2: effective on passage.

Acts 1913, No. 175, § 8: approved Mar. 13, 1913. Emergency clause provided:

"This Act being necessary for the immediate preservation of the public peace, health and safety of the State, the same shall take effect and be in force from and after its passage."

Acts 1917, No. 364, § 2: approved Mar. 24, 1917. Emergency declared.

RESEARCH REFERENCES

ALR. Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury. 9 A.L.R.4th 778.

Employer's liability for injury to babysitter in home or similar premises, 29 A.L.R.4th 304.

State or local governmental unit's liability for injury to private highway construction worker based on its own negligence, 29 A.L.R.4th 1188.

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Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor. 34 A.L.R.4th 914.

Right of employee to injunction preventing employer from exposing employee to tobacco smoke, 37 A.L.R.4th 480.

Liability of employment agency for personal injury or property damage suffered by employer from acts of referred employee, or by employee from acts of referred employer, 41 A.L.R.4th 531.

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Workers' compensation law as precluding employee's suit against employer for third person's criminal attack, 49 A.L.R.4th 926.

Willful, wanton, or reckless conduct of co-employee as ground of liability despite bar of workers' compensation, 57 A.L.R.4th 888.

Injuries incurred while traveling to and from work with employer's receipts, 63 A.L.R.4th 235.

Prejudicial effect of bringing to jury's attention fact that plaintiff in personal injury or death action is entitled to workers' compensation benefits, 69 A.L.R.4th 131.

Dual Capacity Doctrine as basis for employee's recovery for medical malpractice from company medical personnel, 73 A.L.R.4th 115.

Federal Coal Mine Health and Safety Act, liability for retaliation against at-will employee for public complaints or efforts relating to health or safety, 75 A.L.R.4th 13.

Liability of security services company to injured employee as beneficiary of security services contract between company and employer, 75 A.L.R.4th 836.

Third-party tort liability of corporate officer to injured workers, 76 A.L.R.4th 365.

Employer's liability to employee or agent for injury or death resulting from assault or criminal attack by third person, 40 A.L.R.5th 1.

Excessiveness or adequacy of damages awarded for injury to trunk or torso, or internal injuries, 48 A.L.R.5th 129.

Head or brain injuries, excessiveness or adequacy of damages awarded, 50 A.L.R.5th 1.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damages, 52 A.L.R.5th 1.

Setting aside arbitration award on ground of interest or bias of arbitrator - labor disputes, 66 A.L.R.5th 611.

Am. Jur. 27 Am. Jur. 2d, Emp. Relationship, § 248 et seq.

C.J.S. 30 C.J.S., Emp. Liab., § 1 et seq.

11-8-101. Definition.

The word "corporation" as used in §§ 11-8-102 — 11-8-108, unless the context otherwise requires, shall include the receiver or other persons charged with the duty of the management and operation of the business of the corporation.

History. Acts 1913, No. 175, § 6; C. & M. Dig., § 7149; Pope's Dig., § 9135; A.S.A. 1947, § 81-1206.

11-8-102. Exception.

Sections 11-8-101 — 11-8-108 shall not apply to railroad corporations and shall not amend nor repeal any part of §§ 23-12-501 — 23-12-507.

History. Acts 1913, No. 175, § 8; C. & M. Dig., § 7150; Pope's Dig., § 9136; A.S.A. 1947, § 81-1208.

11-8-103. Corporations liable for injury or death resulting from negligence.

(a) Every corporation, except while engaged in interstate commerce, shall be liable in damages to any person suffering injury while he or she is employed by the corporation.

(b) In case of death of the employee, the corporation shall be liable to his or her personal representative for the benefit of the surviving widow or spouse and children of the employee or, if no spouse or children exist, then to the employee's parents or, if none, then to the next of kin of the employee for the injury or death resulting in whole or in part from negligence of the corporation or from the negligence of any of the officers, agents, or employees of the corporation.

History. Acts 1913, No. 175, § 1; C. & M. Dig., § 7144; Pope's Dig., § 9130; A.S.A. 1947, § 81-1201.

ful death, § 16-62-102.

Coal mining companies, liability, § 11-8-109.

Cross References. Actions for wrong-

CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Instruction.
Interstate Commerce.

Constitutionality.

This section is not unconstitutional as violating the 14th amendment to the federal Constitution. *Postal Telegraph-Cable Co. v. White*, 190 Ark. 365, 80 S.W.2d 633 (1935), appeal dismissed, 296 U.S. 534, 56 S. Ct. 102 (1935).

Construction.

This section was patterned after § 1 of the federal Employers' Liability Act; therefore, the construction given to the section of federal act will be given great

weight in construing this section. *Dicken v. Missouri P. R. Co.*, 188 Ark. 1035, 69 S.W.2d 277 (1934).

Instruction.

An instruction in the language of the section without hypothetical statements showing how it would be applicable to the facts developed in the case was erroneous and misleading. *Arkansas Shortleaf Lumber Co. v. Wilkinson*, 149 Ark. 270, 232 S.W. 8 (1920).

Interstate Commerce.

Although corporation was subject to the Wagner Act and similar acts, employee injured was not engaged in interstate commerce at the time of his injury. *Dierks Lumber & Coal Co. v. Noles*, 201 Ark. 1088, 148 S.W.2d 650 (1941).

11-8-104. Contributory negligence no bar to recovery.

(a) In all actions brought against any corporation under or by virtue of any of the provisions of §§ 11-8-101 — 11-8-108 to recover damages for personal injuries to an employee, or where the injuries have resulted in his or her death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury and not by the court in proportion to the amount of negligence attributable to the employee.

(b) However, no employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by the corporation of any statute enacted for the safety of employees contributed to the injury or death of the employee.

History. Acts 1913, No. 175, § 2; C. & M. Dig., § 7145; Pope's Dig., § 9131; A.S.A. 1947, § 81-1202.

RESEARCH REFERENCES

Ark. L. Rev. Comparative Negligence, 9 Ark. L. Rev. 357.

Comparative Negligence — A Survey for Arkansas Lawyers, 10 Ark. L. Rev. 1.

Comparative Negligence in Arkansas: A "Before and After" Survey, 13 Ark. L. Rev. 89.

CASE NOTES**ANALYSIS**

In General.

Applicability.

Instructions.

Interstate Commerce.

Lack of Props.

Negligent Co-worker.

In General.

Where the violation of any statute enacted for the safety of the employees contributes to the injury or death of an employee, the master cannot invoke the defense of contributory negligence and assumption of risk on the part of the employee. *Western Coal & Mining Co. v. Watts*, 131 Ark. 562, 199 S.W. 921 (1917).

Defense of contributory negligence is eliminated from all actions for personal injuries while employed by corporations not engaged in interstate commerce. *Athletic Mining & Smelting Co. v. Sharp*, 135 Ark. 330, 205 S.W. 695 (1918); *Dierks Lumber & Coal Co. v. Tollerson*, 186 Ark. 429, 54 S.W.2d 61 (1932); *W.P. Brown & Sons Lumber Co. v. Oaties*, 189 Ark. 338, 72 S.W.2d 213 (1934); *Goodin v. Boyd*

Sicard Coal Co., 197 Ark. 175, 122 S.W.2d 548 (1938).

Applicability.

This section applies to all corporations except while engaged in interstate commerce. *Ward Furn. Mfg. Co. v. Weigand*, 173 Ark. 762, 293 S.W. 1002 (1927).

This section had no application where the plaintiff's intestate was not an employee of the defendant and the defendant was not a corporation. *Fair Oaks Stave Co. v. Shue*, 184 Ark. 1041, 44 S.W.2d 670 (1932).

Instructions.

In an action for injury or death of employee, a requested instruction giving this section without explanation should be refused. *Presley v. Actus Coal Co.*, 172 Ark. 498, 289 S.W. 474 (1927).

In a suit by an employee for personal injuries, a requested instruction that if plaintiff gave orders which caused his own injury he could not recover was erroneous. *Sun Oil Co. v. Hedge*, 173 Ark. 729, 293 S.W. 9 (1927).

An instruction which made contributory negligence a bar to recovery by a servant

for personal injuries against a corporation was erroneous. *Seaman-Dunning Corp. v. Haralson*, 182 Ark. 93, 29 S.W.2d 1085 (1930); *Hartman-Clark Bros. Co. v. Melton*, 190 Ark. 1001, 82 S.W.2d 257 (1935); *Goodin v. Boyd-Sicard Coal Co.*, 197 Ark. 175, 122 S.W.2d 548 (1938).

Interstate Commerce.

Where employee was a domestic corporation not engaged in interstate commerce, proof of contributory negligence on the part of the employee did not entitle employer to an instructed verdict. *Ward Furn. Mfg. Co. v. Pickle*, 174 Ark. 463, 295 S.W. 727 (1927).

Lack of Props.

While contributory negligence does not bar a recovery, it does diminish the damages in proportion to the negligence attributable to the person injured. *Central Coal & Coke Co. v. Barnes*, 149 Ark. 533, 233 S.W. 683 (1921); *Southern Anthracite Coal Mining Co. v. Rice*, 156 Ark. 94, 245 S.W. 805 (1922); *Missouri Pac. Transp. Co. v. Baxter*, 189 Ark. 1147, 76 S.W.2d 958 (1934).

The only defense left to a coal company when sued for personal injuries sustained

for lack of props was to show that the props were not requested or, if requested, the failure to furnish them was not the proximate cause of the injury. *New Union Coal Co. v. Walker*, 182 Ark. 460, 31 S.W.2d 753 (1930).

Negligent Co-worker.

In an action by an employee against his corporation-employer and a fellow-servant, contributory negligence is a complete defense for the fellow-servant but, as to the corporation, the doctrine of comparative negligence applies. *Mississippi River Fuel Corp. v. Senn*, 184 Ark. 554, 43 S.W.2d 255 (1931); *Dierks Lumber & Coal Co. v. Noles*, 201 Ark. 1088, 148 S.W.2d 650 (1941).

In an action by an employee against his corporation-employer and a fellow-servant, contributory negligence is a complete defense for the fellow-servant but, as to the corporation, the doctrine of comparative negligence applies. *American Co. v. Baker*, 187 Ark. 492, 60 S.W.2d 572 (1933).

Cited: *Dierks Lumber & Coal Co. v. Noles*, 201 Ark. 1088, 148 S.W.2d 650 (1941).

11-8-105. Assumption of risk no defense when safety statute violated.

In any action brought against any corporation under or by virtue of any of the provisions of §§ 11-8-101 — 11-8-108 to recover damages for injuries to, or the death of, any of its employees, the employee shall not be held to have assumed the risks of his or her employment in any case where the violation by the corporation of any statute enacted for the safety of employees contributed to the injury or death of the employee.

History. Acts 1913, No. 175, § 3; C. & M. Dig., § 7146; Pope's Dig., § 9132; A.S.A. 1947, § 81-1203.

CASE NOTES

ANALYSIS

Evidence.

Mines.

Negligence of Co-worker.

Occupational Diseases.

Evidence.

Evidence supported finding that employee had not assumed the risk of injury.

Poinsett Lumber & Mfg. Co. v. Longino, 139 Ark. 69, 213 S.W. 15 (1919).

Mines.

Assumed risk is no defense where a miner is injured as result of failure to furnish props as required by law in a mine. *Southern Anthracite Coal Mining Co. v. Rice*, 156 Ark. 94, 245 S.W. 805 (1922).

In an action against a coal mining company for negligently causing the death of an employee, an instruction that the deceased assumed the risk if he departed from the line of duty was proper. *Presley v. Actus Coal Co.*, 172 Ark. 498, 289 S.W. 474 (1927).

Negligence of Co-worker.

An employee does not assume the risk of negligence of a fellow servant. *Poinsett Lumber & Mfg. Co. v. Longino*, 139 Ark. 69, 213 S.W. 15 (1919).

Occupational Diseases.

Employee does not assume the risk of contracting occupational disease if the disease results from the failure of his employer to comply with the provisions of any section enacted for his safety. *Barksdale v. Silica Prods. Co.*, 200 Ark. 32, 137 S.W.2d 901 (1940).

Cited: *L.J. Smith Constr. Co. v. Tate*, 151 Ark. 278, 237 S.W. 83 (1922).

11-8-106. Contract exemptions void — Setoff for insurance contributions.

(a) Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any corporation to exempt itself from any liability created by §§ 11-8-101 — 11-8-108, shall to that extent be void.

(b) However, in any action brought against any corporation under or by virtue of any of the provisions of §§ 11-8-101 — 11-8-108, the corporation may set off therein any sum it has contributed or paid to any insurance relief benefit or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which the action was brought.

History. Acts 1913, No. 175, § 4; C. & M. Dig., § 7147; Pope's Dig., § 9133; A.S.A. 1947, § 81-1204.

CASE NOTES

ANALYSIS

Constitutionality.
Foreign Corporation.
Jury Question.

Constitutionality.

This section is not unconstitutional as denying corporations equal protection, freedom of contract or due process. *Standard Pipe Line Co. v. Burnett*, 188 Ark. 491, 66 S.W.2d 637 (1933), cert. denied, 292 U.S. 649, 54 S. Ct. 857, 78 L. Ed. 1499 (1934), superseded by statute as stated in, *Ray v. Albemarle Corp.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 2480 (W.D. Ark. Jan. 14, 2009).

Foreign Corporation.

In an action by an employee on a cause which arose in this state against an out-

of-state corporate employer, a defense that the employee contracted with the employer that any injury was to be compensated under the Workers' Compensation Act of that state was precluded by this section. *Standard Pipe Line Co. v. Burnett*, 188 Ark. 491, 66 S.W.2d 637 (1933), cert. denied, 292 U.S. 649, 54 S. Ct. 857, 78 L. Ed. 1499 (1934), superseded by statute as stated in, *Ray v. Albemarle Corp.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 2480 (W.D. Ark. Jan. 14, 2009).

Jury Question.

Invalidity of release devised to exempt the employer from liability for personal injuries in violation of this section was a question for the jury. *Postal Telegraph-Cable Co. v. White*, 188 Ark. 361, 66 S.W.2d 642 (1933).

11-8-107. Limitation of action.

No action shall be maintained under §§ 11-8-101 — 11-8-108 unless commenced within three (3) years from the date the cause of action accrued.

History. Acts 1913, No. 175, § 5; 1917, § 7148; Pope's Dig., § 9134; A.S.A. 1947, No. 364, § 1, p. 1789; C. & M. Dig., § 81-1205.

RESEARCH REFERENCES

Ark. L. Rev. Negligence — Wrongful Death — Statute of Limitation, 15 Ark. L. Rev. 424.

CASE NOTES

ANALYSIS

Accrual of Action.
Pleading.

Accrual of Action.

A cause of action for injuries to an employee began to run from the date of the negligent act complained of and not from the time the full extent of the injury was ascertained. *Field v. Gazette Publishing Co.*, 187 Ark. 253, 59 S.W.2d 19 (1933); *Barksdale v. Silica Prods. Co.*, 200 Ark. 32, 137 S.W.2d 901 (1940).

Pleading.

Where in defendant's answer it said "the defendant specifically pleads the statute of limitations in case of recovery of the plaintiff," the plea was sufficient to raise the issue of limitation and the use of the word "case" was a misprision and would be treated as though the word "bar" had been used. *Louis Werner Sawmill Co. v. Dyer*, 132 Ark. 78, 200 S.W. 281 (1917).

11-8-108. Survival of cause of action.

Any right of action given by §§ 11-8-101 — 11-8-108 to a person suffering injury shall survive to his or her personal representative for the benefit of the surviving spouse and children of the employee and, if none, then of the employee's parents and, if none, then of the next of kin of the employee, but in these cases, there shall be only one (1) recovery for the same injury.

History. Acts 1913, No. 175, § 7; C. & M. Dig., § 7150; Pope's Dig., § 9136; A.S.A. 1947, § 81-1207.

11-8-109. Liability of companies engaged in coal mining.

Every company, whether incorporated or not, engaged in the mining of coal who may employ agents, servants, or employees, those agents, servants, or employees being in the exercise of due care, shall be liable to respond in damages for injuries or death sustained by an agent, employee, or servant when resulting from the careless omission of duty or negligence of the employer or which may result from the carelessness, omission of duty, or negligence of any other agent, servant, or

employee of the employer, in the same manner and to the same extent as if the carelessness, omission of duty, or negligence causing the injury or death was that of the employer.

History. Acts 1907, No. 69, § 1, p. 162; C. & M. Dig., § 7137; Pope's Dig., § 9123; A.S.A. 1947, § 81-1209.

Publisher's Notes. This section may be superseded by § 11-8-103 with respect to corporations covered by § 11-8-103.

CASE NOTES

ANALYSIS

Constitutionality.
Applicability.
Assumption of Risk.
Burden of Proof.
Negligence.

Constitutionality.

This section constitutes a reasonable exercise of the right reserved by Ark. Const., Art. 12, § 6. *Ozan Lumber Co. v. Biddie*, 87 Ark. 587, 113 S.W. 796 (1908); *Aluminum Co. of N. Am. v. Ramsey*, 89 Ark. 522, 117 S.W. 568 (1909), *aff'd*, 222 U.S. 251, 32 S. Ct. 76 (1911) (decisions prior to enactment of § 11-8-103).

This section is not repugnant to the Equal Protection Clause of the Fourteenth Amendment. *Phillips Petro. Co. v. Jenkins*, 297 U.S. 629, 56 S. Ct. 611, 80 L. Ed. 943 (1936), rehearing denied, *Phillips Petroleum Co. v. Jenkins*, 298 U.S. 691, 56 S. Ct. 745, 80 L. Ed. 1409 (1936).

Applicability.

This section does not create any liability against improvement districts or the commissioners thereof. *Board of Improv. v. Moreland*, 94 Ark. 380, 127 S.W. 469 (1910) (decision prior to enactment of § 11-8-103).

This section does not apply to a partnership. *Graham v. Thrall & Shea*, 95 Ark. 560, 129 S.W. 532 (1910); *Jones v. Mayberry*, 143 Ark. 390, 220 S.W. 479 (1920).

In an action against a foreign corporation for personal injuries resulting from the negligence of a fellow servant, this section is applicable. *Caddo River Lumber Co. v. Grover*, 126 Ark. 449, 190 S.W. 560 (1916).

This section applies to an individual operating a coal mine as well as to associations of persons. *Harger v. Harger*, 144 Ark. 375, 222 S.W. 736 (1920).

Assumption of Risk.

A servant who is aware of the habitual negligence of a fellow servant does not assume the risk of injury therefrom. *Saint Louis, I.M. & S. Ry. v. Ledford*, 90 Ark. 543, 119 S.W. 1123 (1909) (decision prior to enactment of § 11-8-103).

Under this section servant does not assume risk of danger or peril caused by negligence of his fellow servants. *Saint Louis S.W. Ry. v. Burd*, 93 Ark. 88, 124 S.W. 239 (1910); *Saint Louis, I.M. & S. Ry. v. Davis*, 93 Ark. 484, 124 S.W. 754 (1910); *A.L. Clark Lumber Co. v. Bolin*, 97 Ark. 344, 133 S.W. 1116 (1911); *St. Louis, I. M. & S. R. Co. v. Booth*, 98 Ark. 227, 135 S.W. 811 (1911); *Missouri & N. A. R. Co. v. VanZant*, 100 Ark. 462, 140 S.W. 587 (1911); *F. Kiech Mfg. Co. v. Hopkins*, 108 Ark. 578, 158 S.W. 981 (1913); *Chapman & Dewey Land Co. v. Woodruff*, 116 Ark. 189, 173 S.W. 188 (1915); *Missouri Pac. Transp. Co. v. Baxter*, 189 Ark. 1147, 76 S.W.2d 958 (1934).

The negligence of the master or of a fellow servant in failing to provide a safe place to work where the servant is unaware of the negligence is not assumed by the servant. *St. Louis, I. M. & S. R. Co. v. Vann*, 98 Ark. 145, 135 S.W. 816 (1911) (decision prior to enactment of § 11-8-103).

Injured employee was not chargeable with having assumed, as incident to his employment, the risk of being hurt unless he realized the danger and then voluntarily exposed himself to it. *Saint Louis, I.M. & S. Ry. v. Brogan*, 105 Ark. 533, 151 S.W. 699 (1912) (decision prior to enactment of § 11-8-103).

The master was liable for negligence in failing to discover and to suppress the dangerous practice of employees. *Henry Wrape Co. v. Barrentine*, 138 Ark. 267, 211 S.W. 366 (1919).

In an action against a company for injuries caused by a fellow servant's neg-

ligence, an instruction that there is no assumed risk as to the negligence of the fellow servant unless the plaintiff realized the danger and then exposed himself to it was erroneous; the correct rule being that the plaintiff assumed the risk of the dangers as were so obvious that he could and should have discovered the same in the exercise of ordinary care. *Edgar Lumber Co. v. Denton*, 156 Ark. 46, 245 S.W. 177 (1922).

Burden of Proof.

Burden is on defendant to prove contributory negligence. *Soard v. Western An-*

thracite Coal & Mining Co., 92 Ark. 502, 123 S.W. 759 (1909) (decision prior to enactment of § 11-8-103).

Negligence.

Violation of a rule or custom established for the protection of employees is negligence per se. *Saint Louis, I.M. & S. Ry. v. Aiken*, 100 Ark. 437, 140 S.W. 698 (1911) (decision prior to enactment of § 11-8-103).

CHAPTER 9

WORKERS' COMPENSATION

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. WORKERS' COMPENSATION COMMISSION.
3. FUNDS — TAXES AND FEES.
4. EMPLOYER LIABILITY — INSURANCE.
5. ACCIDENTAL INJURY OR DEATH.
6. OCCUPATIONAL DISEASE.
7. PROCEEDINGS BEFORE WORKERS' COMPENSATION COMMISSION.
8. PAYMENT.
9. WORKERS' COMPENSATION PRIVATE SECTOR SELF-INSURER GUARANTY FUNDS.
10. REVISION OF WORKERS' COMPENSATION LAWS.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-8 may not apply to subchapter 9, which was enacted separately.

References to "this chapter" in subchapters 1-4, 6-10, and §§ 11-9-501 to 11-9-529 may not apply to § 11-9-530 which was enacted subsequently.

References to "this chapter" in §§ 11-9-

101 — 11-9-115, 11-9-117, 11-9-118, and subchapters 2-10 may not apply to §§ 11-9-116, 11-9-517 and 11-9-518, which were enacted separately.

Cross References. County employees, workers' compensation, § 14-26-101 et seq.

Municipal employees, workers' compensation, § 14-60-101 et seq.

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CASE NOTES

ANALYSIS

Constitutionality.

In General.

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Burden of Proof.

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Unemployment Benefits.

Constitutionality.

Full authority to enact former Workers' Compensation law was given by Ark. Const. Amend. 26, the effect of which is to amend both Ark. Const., Art. 2, § 7 and Ark. Const., Art. 5, § 32. *Young v. G.L. Tarlton, Contractor*, 204 Ark. 283, 162 S.W.2d 477 (1942) (decision under prior law).

Former Workers' Compensation law was not unconstitutional for depriving claimant of right to trial by jury. *Young v. G.L. Tarlton, Contractor*, 204 Ark. 283, 162 S.W.2d 477 (1942) (decision under prior law).

Former Workers' Compensation law was not violative of the federal Constitution or of the Constitution of Arkansas. *Hagger v. Wortz Biscuit Co.*, 210 Ark. 318, 196 S.W.2d 1 (1946) (decision under prior law).

In General.

The right to claim compensation under former Workers' Compensation Act was purely statutory and claimant is limited to only the right to claims expressly given by the act. *Barth v. Liberty Mut. Ins. Co.*, 212 Ark. 942, 208 S.W.2d 455 (1948) (decision under prior law).

Workers' compensation laws are entitlement legislation. *Arkansas Secretary of State v. Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987).

Construction.

Former Workers' Compensation law was highly remedial, enacted for the purpose of placing a part of the burden of loss from industrial accidents upon the public at large and was entitled to a liberal construction. *Mack Coal Co. v. Hill*, 204 Ark. 407, 162 S.W.2d 906 (1942); *Williams Mfg. Co. v. Walker*, 206 Ark. 392, 175 S.W.2d 380 (1943) (preceding cases decided under prior law).

Workers' Compensation law should be accorded a broad and liberal construction. *Elm Springs Canning Co. v. Sullins*, 207 Ark. 257, 180 S.W.2d 113 (1944); *E.H. Noel Coal Co. v. Grilc*, 215 Ark. 430, 221 S.W.2d 49 (1949) (preceding cases decided under prior law); *Triebisch v. Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951); *Hixson Coal Co. v. Furstenberg*, 225 Ark. 568, 284 S.W.2d 120 (1955); *Boyd Excelsior Fuel Co. v. McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *Shaw v. Keeshin Poultry Co.*, 227 Ark. 90, 296 S.W.2d 400 (1956); *Cummings v. United Motor Exch., Inc.*, 236 Ark. 735, 368 S.W.2d 82 (1963); *Guthrie v. Tyson Foods, Inc.*, 20 Ark. App. 69, 724 S.W.2d 187 (1987); *Arkansas Secretary of State v. Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987).

Doubtful cases should be resolved in favor of the claimant. *Elm Springs Canning Co. v. Sullins*, 207 Ark. 257, 180 S.W.2d 113 (1944) (decision under prior law); *Triebisch v. Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951); *Hixson Coal Co. v. Furstenberg*, 225 Ark. 568, 284 S.W.2d 120 (1955); *Boyd Excelsior Fuel Co. v. McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *Cummings v. United*

Motor Exch., Inc., 236 Ark. 735, 368 S.W.2d 82 (1963); McGehee Hatchery Co. v. Gunter, 237 Ark. 448, 373 S.W.2d 401 (1963); Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59, 696 S.W.2d 779 (1985).

Commission took a liberal view of former Workers' Compensation law, so where one inference would support an award, and another inference would defeat it, the construction favorable to the claimant should have been adopted, if factually sound. Stout Constr. Co. v. Wells, 214 Ark. 741, 217 S.W.2d 841 (1949) (decision under prior law).

The Supreme Court does not favor any interpretation of the statutes which would encourage employee to quit work for the purpose of drawing compensation when he was actually able to work. Quality Excelsior Coal Co. v. Smith, 233 Ark. 67, 342 S.W.2d 480 (1961).

Although there are differences in the general construction of Workers' Compensation laws and employee insurance exclusions, there was little doubt that the essential elements of employment remained the same, which caused them to be relevant to each other. Eagle Star Ins. Co. v. Deal, 474 F.2d 1216 (8th Cir. 1973).

In determining where the preponderance of the evidence lies, the Workers' Compensation Commission must draw all legitimate inferences and resolve doubts in favor of the claimant, viewing and construing the evidence in favor of the claimant and the purpose of this chapter to compensate those who, by reasonable construction, are within the terms of this chapter. O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979).

Although this chapter is remedial and should be construed liberally in favor of the worker, this does not mean that the court should either enlarge or restrict plain provisions of the chapter. Curtis v. Ermert Funeral Home & Ins. Co. of N. Am., 4 Ark. App. 274, 630 S.W.2d 57 (1982).

It is the duty of the commission to follow a liberal approach and to draw all reasonable inferences in favor of the claimant. Southland Corp. v. Magers, 15 Ark. App. 360, 695 S.W.2d 380 (1985).

The provisions of the Workers' Compensation Act are to be construed liberally in favor of the claimant in light of its beneficent and humane purposes, and all doubtful issues must be resolved in favor of the

claimant. Ashby v. Arkansas Vinegar Co., 22 Ark. App. 167, 737 S.W.2d 177 (1987), *aff'd*, 294 Ark. 412, 743 S.W.2d 798 (1988).

Purpose.

Former Workers' Compensation law did not call for general accident insurance, its purpose being to compensate only for losses resulting from the risks to which the fact of engaging in the industry exposes the employee. Birchett v. Tuf-Nut Garment Mfg. Co., 205 Ark. 483, 169 S.W.2d 574 (1943), *overruled in part*, Southern Cotton Oil Div. v. Childress, 237 Ark. 909, 377 S.W.2d 167 (Ark. 1964) (decision under prior law).

The policy behind former Workers' Compensation law was that it is fairer to discharge, as an expense of the industry to be paid by the ultimate consumer, a part of the losses arising from the risks to which those engaged in that industry are exposed by reason of being so engaged, than to let the losses fall entirely upon the employee who gets hurt. Birchett v. Tuf-Nut Garment Mfg. Co., 205 Ark. 483, 169 S.W.2d 574 (1943), *overruled in part*, Southern Cotton Oil Div. v. Childress, 237 Ark. 909, 377 S.W.2d 167 (Ark. 1964) (decision under prior law).

The purpose and effect of former Workers' Compensation law was to substitute, as to employees embraced within its terms, the liability thereby created for all liability of the master arising from the death or injury of his servant. Odom v. Arkansas Pipe & Scrap Material Co., 208 Ark. 678, 187 S.W.2d 320 (1945) (decision under prior law).

One of the primary reasons for workers' compensation is to spread the loss arising from injury to the employee throughout industry. Aetna Ins. Co. v. Smith, 263 Ark. 849, 568 S.W.2d 11 (1978).

The basic purpose of this chapter is to shift the burden of work-related injuries from individual employers and employees to the consuming public by making available to the injured employee a speedy and informal statutory remedy. Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325 (8th Cir. 1985).

Workers' compensation insurance has the salutary purpose of protecting employees, employers and the public by providing a means by which injured workers may be compensated during the period of their inability to work caused by the injury so

that they may continue to exist and feed their families. The public is protected because, hopefully, this prevents injured workers from becoming wards of the state maintained at the expense of the public. *Wal-Mart Stores, Inc. v. Crist*, 664 F. Supp. 1242 (W.D. Ark. 1987), rev'd, 855 F.2d 1326 (8th Cir. Ark. 1988).

The workers' compensation laws were enacted to create rights and benefits for injured workers and their dependents. *Arkansas Secretary of State v. Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987).

Applicability.

Workers' Compensation Commission does not have jurisdiction of action for slander, as this chapter does not provide for compensation for damage to character as the result of slander. *Braman v. Walthall*, 215 Ark. 582, 225 S.W.2d 342 (1949), overruled, *United Ins. Co. of Am. v. Murphy*, 331 Ark. 364, 961 S.W.2d 752 (Ark. 1998).

This chapter deals, not with intentional wrongs, but only with accidental injuries. *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950).

Where employee alleged that employer intentionally destroyed or negligently lost parts of machine that caused employee's injury, and consequently damaged employee's products liability suit against the supplier of the machine, the Workers' Compensation Act did not apply and the employer was not protected by the exclusivity provision. *Wilson v. Beloit Corp.*, 869 F.2d 1162 (8th Cir. 1989).

The Arkansas Workers' Compensation Act does not specify what extrastate situations it covers. An employer's liability under the Act, however, is based upon disability or death from an injury arising out of and in the course of employment, and "employment" is defined as every employment carried on in the state. Therefore, the application of the Arkansas Workers' Compensation Act is limited by its terms to harms arising out of employments carried on in Arkansas. *Patton v. Brown & Root, Inc.*, 31 Ark. App. 141, 789 S.W.2d 745 (1990).

Burden of Proof.

The rule of liberal construction is not a substitute for a claimant's burden of establishing an injury by a preponderance of the evidence. *Central Maloney, Inc. v.*

York, 10 Ark. App. 254, 663 S.W.2d 196 (1984).

Employer Immunity.

The act was not intended to extend employer's immunity from damages for an injury suffered by an employee to include an employee's cause of action against a third party. Even though the employer will have a setoff against at least part of the damages established in the third party action because of compensation benefits paid, the employee has a right to seek reimbursement against the third party for losses incurred, especially those in excess of scheduled benefits provided by law. *Wilson v. Beloit Corp.*, 869 F.2d 1162 (8th Cir. 1989).

Exclusive Remedy.

Where an action involves both the Uniform Contribution among Tortfeasors Act, § 16-61-201 et seq., and this chapter, it is in the interest of public policy and in keeping with the intent of the General Assembly to give this chapter priority as an exclusive remedy. *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982), superseded by statute as stated in, *Billings v. Aeropres Corp.*, 522 F. Supp. 2d 1121 (E.D. Ark. 2007).

Jurisdiction.

The first jurisdictional fact that must be established under this chapter is that the claimant or decedent was in fact and in law an employee of the person against whom the claim is asserted. *Eagle Star Ins. Co. v. Deal*, 337 F. Supp. 1264 (W.D. Ark. 1972), rev'd, 474 F.2d 1216 (8th Cir. 1973).

Federal district court does not have jurisdiction to determine whether a person is entitled to Workers' Compensation benefits under Arkansas law. *Eagle Star Ins. Co. v. Deal*, 337 F. Supp. 1264 (W.D. Ark. 1972), rev'd, 474 F.2d 1216 (8th Cir. 1973).

The Workers' Compensation Commission had jurisdiction of a claim arising from an accident in another state, where the employer was an Arkansas corporation, and where the contract for hire was consummated in Arkansas. *Midwest Dredging Co. v. Etzberger*, 270 Ark. 936, 606 S.W.2d 619 (1980).

Where claimant was injured while working in another state and the only circumstance bearing on jurisdiction was

that claimant was an Arkansas resident, and facts connecting the state with the employment per se were entirely lacking, the statutory basis required for the commission's jurisdiction was absent. *Patton v. Brown & Root, Inc.*, 31 Ark. App. 141, 789 S.W.2d 745 (1990).

Trial court did not err in holding that it had concurrent jurisdiction to determine the applicability of this chapter. *Craig v. Traylor*, 323 Ark. 363, 915 S.W.2d 257 (1996). But see *VanWagoner v. Beverly Enters.*, 334 Ark. 12, 970 S.W.2d 810 (Ark. 1998).

Unemployment Benefits.

An unemployed, partially disabled person may still be able to compete in the labor market and may qualify for unemployment benefits as one available for work, although she may be receiving partial permanent disability benefits under this chapter. *Ross v. Daniels*, 266 Ark. 1056, 599 S.W.2d 390 (Ct. App. 1979).

Cited: *Miller v. Missouri Pac. Transp. Co.*, 225 Ark. 475, 283 S.W.2d 158 (1955); *Muse v. Prescott Sch. Dist.*, 233 Ark. 789, 349 S.W.2d 329 (1961); *American Cas. Co. v. Hambleton*, 233 Ark. 942, 349 S.W.2d 664 (1961); *Auto Salvage Co. v. Rogers*, 232 Ark. 1013, 342 S.W.2d 85 (1961); *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969); *Rhoads v. Service Machine Co.*, 329 F. Supp. 367 (E.D. Ark. 1971); *Dulin v. Circle F Indus., Inc.*, 558 F.2d 456 (8th Cir. 1977); *Arkansas Emp. Sec. Div. v. Beeler*, 2 Ark. App. 251, 620 S.W.2d 307 (1981); *Fraternal Order of Eagles v. Kirby*, 6 Ark. App. 198, 639 S.W.2d 529 (1982); *Miller v. Ensco, Inc.*, 286 Ark. 458, 692 S.W.2d 615 (1985); *Webb v. Workers' Comp. Comm'n*, 292 Ark. 349, 730 S.W.2d 222 (1987); *Washington County v. Ford*, 21 Ark. App. 206, 730 S.W.2d 515 (1987); *Tuggle v. Shelter Mut. Ins. Co.*, 961 F.2d 794 (8th Cir. 1992).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 11-9-101. Title — Purpose.
- 11-9-102. Definitions.
- 11-9-103. Applicability.
- 11-9-104. Effect of unconstitutionality.
- 11-9-105. Remedies exclusive — Exception.
- 11-9-106. Penalties for misrepresentation.
- 11-9-107. Penalties for discrimination for filing claim.
- 11-9-108. Waiver of compensation void — Exception.
- 11-9-109. Agreement to pay premium void.
- 11-9-110. Compensation nonassignable, etc., and payable to dependents only — Child support obligations excepted.

SECTION.

- 11-9-111. Compensation payable to certain alien dependents.
- 11-9-112. Preference for due compensation.
- 11-9-113. Mental injury or illness.
- 11-9-114. Heart or lung injury or illness.
- 11-9-115. Disclosure of child support obligations.
- 11-9-116. Fund transfer to support Workers' Compensation Fraud Unit of the State Insurance Department.
- 11-9-117. Carpal tunnel syndrome guidelines.
- 11-9-118. Provider payments while claims are pending.

Cross References. Employers' liability, § 11-8-101 et seq.

Public Employee Workers' Compensation Act, § 21-5-601 et seq.

Workmen's compensation laws, Ark. Const. Amend. 26.

Effective Dates. Acts 1971, No. 162, § 3: Feb. 26, 1971. Emergency clause provided: "It is hereby found and determined

by the General Assembly that the present Workmen's Compensation laws provide for coverage of self-employed employers, and that clarification thereof is necessary to enable officers of a corporation to exclude themselves from coverage under Workmen's Compensation laws. Therefore, an emergency is hereby declared to exist and this Act being necessary for the

immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1227, § 18: Section 2 effective Sept. 1, 1976.

Acts 1975 (Extended Sess., 1976), No. 1227, § 21: Feb. 13, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that the welfare of both employer and employee is of primary interest and concern to the State of Arkansas; that the maximum benefits presently payable under the Workmen's Compensation law are inadequate due to the steadily increasing cost of living and should be increased immediately to meet said increase in the cost of living; that certain other provisions should be clarified or modified, and that it is in the best interest of both employers and employees that this be accomplished as soon as possible. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 119, § 3: Feb. 13, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that under the present Workers' Compensation law a sole proprietor or partner is not eligible to obtain worker's compensation coverage for himself; that the inability to obtain such coverage is creating a serious hardship on such sole proprietors and partners as well as general contractors for whom they provide services; that this Act is designed to alleviate this problem by enabling such persons to obtain workers' compensation coverage and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 253, § 12: Mar. 2, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain provisions of the Workers' Compensation law are in urgent need of revision to more clearly define the benefits to be provided by Worker's Compensation coverage; that this Act is de-

signed to provide such clarification and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 290, § 17: Mar. 3, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is urgent need to clarify the provisions of the Arkansas Workers' Compensation law and to provide improved benefits for persons qualifying under this Act; that this Act is designed to provide such clarification and improved benefits and should be given effect at the earliest possible date. Therefore an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 631, § 5: Mar. 23, 1981. Emergency clause provided: "It is hereby found and determined by the Seventy-Third General Assembly that the law as to permissible cross appeals to the Workers' Compensation Commission and the Arkansas Court of Appeals is ambiguous and must be clarified immediately to eliminate the possibility of inequitable treatment of parties before these tribunals; that Section 20 of the Workers' Compensation Act should be immediately amended to eliminate internal inconsistency in the Act; and that the scope of the Commission's authority to award attorneys fees on a lump sum is unclear and must be immediately clarified. Therefore, an emergency is hereby declared to exist, and this Act, being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1986 (2nd Ex. Sess.), No. 10, § 15: July 1, 1986. Emergency clause provided: "It is hereby found and determined by the General Assembly that the increased benefits and improvements in the administration of the Workers' Compensation system in Arkansas is in the best interest of employees, employers, the public in general; therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety shall

be in full force and effect from and after July 1, 1986."

Acts 1987, No. 524, § 4: Aug. 1, 1987.

Acts 1987, No. 1015, § 21: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1227 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 796, § 41: July 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Workers' Compensation Law is in immediate need of substantial revision; that this act accomplishes immediate revision; and that this act shall go into effect as soon as is practical which is determined to be July 1, 1993; and that unless this emergency clause is adopted, this act will not go into effect until after July 1, 1993. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1993. Furthermore, the provisions of this act shall apply only to injuries which occur after July 1, 1993."

Acts 1997, No. 479, § 16: Mar. 13, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that the limited liability company statute and other acts relating to pass through entities and related laws need amending in order to better reflect the intent and operation of those laws as originally drafted and to be consistent with current trends. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by

the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.

"Notwithstanding the foregoing, SECTION 10 of this act (§ 4-32-802(c)) shall only apply to limited liability companies in existence [sic] on the effective date of this act in the event an election is made with the Secretary of State to have this provision apply; otherwise, the original § 4-32-802(c) shall apply to limited liability companies existing on the effective date of this act."

Acts 1997, No. 808, § 17: July 1, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Workers' Compensation Law is in immediate need of revision; that this act accomplishes immediate revision; and that this act shall go into effect as soon as is practical which is determined to be July 1, 1997; and that unless this emergency clause is adopted, this act will not go into effect until after July 1, 1997. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1997."

Acts 1999, No. 881, § 28: Mar. 25, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly of the State of Arkansas that the present funeral pre-need laws, employee leasing firm laws, and other insurance laws are inadequate to protect the public. In pertinent part, the changes to the Insurance Code needed to assure the stability of funding for the Fraud Investigation Division of the Department must be enacted in the laws of this state well before the new fiscal year beginning July 1, 1999. The changes to authorized appropriations, as well as changes to the disability (health) insurance laws on individuals to conform to the federal laws on group policies with guaranteed renewability require immediate adoption; and unless this emergency clause is adopted, this act might not become effective until after the beginning of the next fiscal year. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after the date of its passage and

approval. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1179, § 19: July 1, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1999 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1999 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1999."

Acts 2001, No. 743, § 3: Mar. 13, 2001. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the Arkansas Insurance Code is in immediate need of revision to protect the insurance-buying consumers of this state; that the provisions of this act are essential to the successful operations and activities of the Insurance Fraud Investigation Division and the Worker's Compensation Fraud Investigation Unit of the Arkansas Insurance Department which are intended to provide protection to the insurance-buying consumers of this state; delay in the effective date of this act would work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Gov-

ernor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 1237, § 2: Apr. 10, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the Department of Health, in response to the federal Homeland Security Act of 2002, will begin voluntary smallpox vaccinations of health care workers and public safety personnel on February 19, 2003, and participation in the voluntary program will be enhanced by clarification that an adverse reaction to vaccine will be compensable under the Workers' Compensation Law. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2005, No. 1692, § 2: Apr. 5, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the objective evidence necessary to prove physical or anatomical impairment in worker's compensation cases needs to be clarified; that such changes need to be in effect immediately to provide for clarity with respect worker's compensation insurance coverage; and that this act is immediately necessary to protect the health and safety of workers. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

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Workers' compensation immunity as extending to one owning controlling interest in employer corporation, 30 A.L.R.4th 948.

Discharge from employment for filing claim. 32 A.L.R.4th 1221.

Workers' compensation law as precluding employee's suit against employer for third person's criminal attack, 49 A.L.R.4th 926.

Reasonableness of employee's refusal of medical services tendered by employer, 72 A.L.R.4th 905.

Workers' compensation statute as barring illegally employed minor's tort action, 77 A.L.R.4th 844.

Ownership interest in employer business as affecting status as employee for workers' compensation purposes, 78 A.L.R.4th 973.

Compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 A.L.R.4th 110.

Right of workers' compensation insurer or employer paying to workers' compensation fund, on the compensable death of an employee with no dependents, to indemnity or subrogation from proceeds or wrongful death action brought against third-party tortfeasor, 7 A.L.R.5th 969.

Compensability of injury during tryout, employment test, or similar activity designed to determine employability, 8 A.L.R.5th 798.

Right to workers' compensation for injuries suffered after termination of employment, 10 A.L.R.5th 245.

Eligibility for workers' compensation as affected by claimant's misrepresentation of health or physical condition at time of hiring, 12 A.L.R.5th 658.

Jurors as within coverage of worker's compensation acts, 13 A.L.R.5th 444.

Coverage of employee's injuries or death from exposure to the elements — modern cases, 20 A.L.R.5th 346.

Reopening lump-sum compensation payment, 26 A.L.R.5th 127.

Validity, construction, and application of workers' compensation provisions relating to nonresident alien dependents, 28 A.L.R.5th 547.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment, 47 A.L.R.5th 801.

Construction and effect of statutory exemptions of proceeds of workers' compensation awards, 48 A.L.R.5th 473.

Workers' compensation as precluding employee's suit against employer for sexual harassment, 51 A.L.R.5th 163.

Violation of employment rule as bar to claim for workers' compensation, 61 A.L.R.5th 375.

Availability, rate, or method of calculation of interest on attorneys' fees of penalties, 79 A.L.R.5th 201.

Employee's injuries sustained in use of employer's restroom as covered by workers' compensation, 80 A.L.R.5th 417.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of sudden emotional stimuli involving personnel action, 82 A.L.R.5th 149.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of sudden emotional stimuli involving non-personnel action, 83 A.L.R.5th 103.

Am. Jur. 82 Am. Jur. 2d, Work. Comp., § 1 et seq.

C.J.S. 99 C.J.S., Work. Comp., § 1 et seq.

CASE NOTES

Sexual Harassment.

Under Arkansas law, sexual harassment is not a risk to which an employee is exposed because of the nature of the em-

ployment, but is a risk to which the employee could be equally exposed outside of the employment; therefore, such claim is neither covered nor barred by the Work-

ers' Compensation Act. *King v. Consolidated Freightways Corp.*, 763 F. Supp. 1014 (W.D. Ark. 1991).

11-9-101. Title — Purpose.

(a) This chapter shall be cited as the "Workers' Compensation Law".

(b) The primary purposes of the workers' compensation laws are to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force; to improve workplace safety through safety programs; to improve health care delivery through use of managed care concepts; to encourage the return to work of injured workers; to deter and punish frauds of agents, brokers, solicitors, employers, and employees relating to procurement of workers' compensation coverage or the provision or denial of benefits; to curtail the rise in medical costs associated with the provision of workers' compensation benefits; and to emphasize that the workers' compensation system in this state must be returned to a state of economic viability.

History. Init. Meas. 1948, No. 4, § 1, Acts 1949, p. 1420; Acts 1975 (Extended Sess., 1976), No. 1227, § 1; A.S.A. 1947, § 81-1301; reen. Acts 1987, No. 1015, § 1; Acts 1993, No. 796, § 1.

A.C.R.C. Notes. As amended by Acts 1993, No. 796, § 1, this section provided, in part: "Any and all case law inconsistent with the purposes set forth herein is spe-

cifically annulled."

Acts 2001, No. 1757, § 9, provided: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

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Adopts the Doctrine of Primary Jurisdiction. *VanWagoner v. Beverly Enterprises*, 334 Ark. 12, 970 S.W.2d 810 (1998), 21 U. Ark. Little Rock L. Rev. 413.

CASE NOTES

ANALYSIS

In General.
Purpose.
Employment.
Jurisdiction.

In General.

Denial of employer's writ of prohibition after the circuit court refused to dismiss

employee's negligence claim against employer was proper pursuant to Ark. Const. art. 2, § 13 because a worker whose injury was not covered by the Workers' Compensation Act was not precluded from filing a claim in tort against his employer. *Automated Conveyor Sys. v. Hill*, 362 Ark. 215, 208 S.W.3d 136 (2005).

Arkansas Workers' Compensation Act, § 11-9-101 et seq., including the exclu-

sive-remedy provision of § 11-9-105(a), is made possible by Ark. Const. Amend. 26, which amended Ark. Const. Art. V, § 32; that amendment provides that the Arkansas general assembly has the power to enact legislation prescribing the amount of compensation employers are required to pay for injuries or deaths of employees. *Honeysuckle v. Curtis H. Stout, Inc.*, 2010 Ark. 328, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 500 (Oct. 28, 2010).

Purpose.

The purpose of this chapter is to protect the rights of both the employee and the compensation carrier. *Simpson v. Liberty Mut. Ins. Co.*, 28 F.3d 763 (8th Cir. 1994).

Section 11-9-522(f) and this section restate the goals of avoiding duplicate payments and of curtailing the cost of workers' compensation insurance, which are legitimate governmental concerns. *Golden v. Westark Community College*, 58 Ark. App. 209, 948 S.W.2d 108 (1997), *aff'd* in part, reversed in part, 333 Ark. 41, 969 S.W.2d 154 (1998).

Construction of Workers' Compensation Act had to take into account the purpose of it, which was to provide benefits to workers after they had been injured on the job in order for them to be able to return to work; the purpose of the act was not furthered by denying benefits to the claimant who tried to work through the pain and did not leave the job after the employer refused his request to provide medical treatment and he was unable to pay for it himself. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Employment.

Worker was not in the employment of the employer, a charitable organization, at the time he was injured and thus was not entitled to workers' compensation

benefits; worker was performing labor as part of an alcohol rehabilitation program in which he had enrolled himself, and the work that he performed was temporary work therapy designed to assist him in overcoming his addiction. *Dixon v. Salvation Army*, 360 Ark. 309, 201 S.W.3d 386 (2005).

Jurisdiction.

Arkansas Workers' Compensation Act (WCA), § 11-9-101 et seq., deprives federal district courts of subject-matter jurisdiction over tort claims asserted against in-state employers when the employer's workers have received benefits under the WCA. Without subject matter jurisdiction, the district courts cannot subject in-state employers to compulsory process, which is a requirement for a fair trial under U.S. Const. Amend. VI. *Billings v. Aeropres Corp.*, 522 F. Supp. 2d 1121 (E.D. Ark. 2007).

Court granted a writ of prohibition preventing a circuit court from exercising jurisdiction over a husband's action against an employer arising out of the death of his wife while she was working for the employer because at the point in the litigation, the circuit court was wholly without jurisdiction over the claims as under Arkansas Workers' Compensation Act, §§ 11-9-101 — 1001, the claims were within the exclusive jurisdiction of the Arkansas Workers' Compensation Commission. *Int'l Paper Co. v. Clark Co. Cir. Ct.*, 375 Ark. 127, 289 S.W.3d 103 (2008).

Cited: *Glenn v. Farmers & Merchants Ins. Co.*, 649 F. Supp. 1447 (W.D. Ark. 1986); *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998); *Garcia v. A&M Roofing*, 89 Ark. App. 251, 202 S.W.3d 532 (2005); *Craven v. Fulton Sanitation Serv.*, 361 Ark. 390, 206 S.W.3d 842 (2005).

11-9-102. Definitions.

As used in this chapter:

(1) "Carrier" means any stock company, mutual company, or reciprocal or interinsurance exchange authorized to write or carry on the business of workers' compensation insurance in this state. Whenever required by the context, the term "carrier" shall be deemed to include duly qualified self-insureds or self-insured groups;

(2) "Child" means a natural child, a posthumous child, a child legally adopted prior to injury of the employee, a stepchild, an acknowledged

illegitimate child of the deceased or of the spouse of the deceased, and a foster child;

(3) "Commission" means the Workers' Compensation Commission;

(4)(A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition;

(b) A back or neck injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence; or

(c) Hearing loss which is not caused by a specific incident or which is not identifiable by time and place of occurrence;

(iii) Mental illness as set out in § 11-9-113;

(iv) Heart or cardiovascular injury, accident, or disease as set out in § 11-9-114;

(v) A hernia as set out in § 11-9-523; or

(vi) An adverse reaction experienced by any employee of the Department of Health or any employee of a hospital licensed by the department related to vaccination with Vaccinia vaccines for small-pox, including the Dryvax vaccine, regardless of whether the adverse reaction is the result of voluntary action by the injured employee.

(B) "Compensable injury" does not include:

(i) Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants and which assault or combat amounts to a deviation from customary duties; furthermore, except for innocent victims, injuries caused by horseplay shall not be considered to be compensable injuries;

(ii) Injury incurred while engaging in or performing or as the result of engaging in or performing any recreational or social activities for the employee's personal pleasure;

(iii) Injury which was inflicted upon the employee at a time when employment services were not being performed or before the employee was hired or after the employment relationship was terminated; or

(iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

(C) The definition of "compensable injury" as set forth in this subdivision (4) shall not be deemed to limit or abrogate the right to recover for mental injuries as set forth in § 11-9-113 or occupational diseases as set forth in § 11-9-601 et seq.

(D) A compensable injury must be established by medical evidence supported by objective findings as defined in subdivision (16) of this section.

(E) BURDEN OF PROOF. The burden of proof of a compensable injury shall be on the employee and shall be as follows:

(i) For injuries falling within the definition of compensable injury under subdivision (4)(A)(i) of this section, the burden of proof shall be a preponderance of the evidence; or

(ii) For injuries falling within the definition of compensable injury under subdivision (4)(A)(ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

(F) BENEFITS.

(i) When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter.

(ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

(iii) Under this subdivision (4)(F), benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.

(iv) Nothing in this section shall limit the payment of rehabilitation benefits or benefits for disfigurement as set forth in this chapter;

(5) "Compensation" means the money allowance payable to the employee or to his or her dependents and includes the allowances provided for in § 11-9-509 and funeral expenses;

(6) "Death" means only death resulting from compensable injury as defined in subdivision (4) of this section;

(7) "Department" means the State Insurance Department;

(8) "Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the compensable injury;

(9)(A) "Employee" means any person, including a minor, whether lawfully or unlawfully employed in the service of an employer under any contract of hire or apprenticeship, written or oral, expressed or implied, but excluding one whose employment is casual and not in the course of the trade, business, profession, or occupation of his or her employer and excluding one who is required to perform work for a municipality or county or the state or federal government upon having been convicted of a criminal offense or while incarcerated.

(B) The term "employee" shall not include any individual who is both a licensee as defined in § 17-42-103(7) and a qualified real estate agent as that term is defined in section 3508(b)(1) of the Internal Revenue Code of 1986, including all regulations thereunder.

(C) Any individual holding from the commission a current certification of noncoverage under this chapter shall be conclusively presumed not to be an employee for purposes of this chapter or otherwise during the term of his or her certification or any renewals thereof or until he or she elects otherwise, whichever time period is shorter.

(D) Any reference to an employee who has been injured, when that employee is dead, shall also include his or her legal representative, dependents, and other persons to whom compensation may be payable;

(10) "Employer" means any individual, partnership, limited liability company, association, or corporation carrying on any employment, the receiver or trustee of the same, or the legal representative of a deceased employer;

(11) "Employment" means:

(A) Every employment in the state in which three (3) or more employees are regularly employed by the same employer in the course of business except:

(i) An employee employed as a domestic servant in or about a private home;

(ii) An employee employed to do gardening, maintenance, repair, remodeling, or similar work in or about the private home or residence of the person employing the employee;

(iii) Agricultural farm labor;

(iv) The State of Arkansas and each of the political subdivisions thereof except as provided by §§ 6-17-1401 — 6-17-1405, 14-26-101

— 14-26-104, 14-60-101 — 14-60-104, 19-10-101 — 19-10-103, 19-10-202 — 19-10-210, 19-10-401 — 19-10-406, and 21-5-601 — 21-5-610;

(v) A person for whom a rule of liability for injury or death arising out of and in the course of employment is provided by the laws of the United States;

(vi) A person performing services for any nonprofit religious, charitable, or relief organization;

(vii) Any person engaged in the vending, selling, offering for sale, or delivery directly to the general public of any newspapers, magazines, or periodicals or any person acting as sales agent or distributor as an independent contractor of or for any newspaper, magazine, or periodical; and

(viii) Any individual who is both a licensee as defined in § 17-42-103(7) and a qualified real estate agent as that term is defined in section 3508(b)(1) of the Internal Revenue Code of 1986, including all regulations thereunder;

(B) Every employment in which two (2) or more employees are employed by any person engaged in building or building repair work;

(C) Every employment in which one (1) or more employees are employed by a contractor who subcontracts any part of his or her contract; and

(D) Every employment in which one (1) or more employees are employed by a subcontractor;

(12) "Healing period" means that period for healing of an injury resulting from an accident;

(13) "Insurance Commissioner" means the Insurance Commissioner of the State of Arkansas;

(14)(A) "Major cause" means more than fifty percent (50%) of the cause.

(B) A finding of major cause shall be established according to the preponderance of the evidence;

(15) "Medical services" means those services specified in § 11-9-508;

(16)(A)(i) "Objective findings" are those findings which cannot come under the voluntary control of the patient.

(ii)(a) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers' Compensation Commission, nor the courts may consider complaints of pain.

(b) For the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings.

(iii)(a) Objective evidence necessary to prove physical or anatomical impairment in occupational hearing loss cases may be established by medically recognized and accepted clinical diagnostic methodologies, including, but not limited to, audiological tests that measure air and bone conduction thresholds and speech discrimination ability.

(b) Any difference in the baseline hearing levels must be confirmed with a subsequent test within the next four (4) weeks but not before five (5) days and being adjusted for presbycusis.

(B) Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty;

(17)(A) "State average weekly wage" means the state average weekly wage determined annually by the Department of Workforce Services in the preceding calendar year pursuant to § 11-10-502.

(B) If, for any reason, the determination is not available, the commission shall determine the wage annually after reasonable investigation and public hearing;

(18) "Time of accident" or "date of accident" means the time or date of the occurrence of the accidental incident from which compensable injury, disability, or death results;

(19) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer and includes the amount of tips required to be reported by the employer pursuant to section 6053 of the Internal Revenue Code of 1954 and the regulations promulgated pursuant thereto or the amount of actual tips reported, whichever amount is greater; and

(20)(A) "Widow" shall include only the decedent's legal wife, living with or dependent for support upon him at the time of his death; and

(B) "Widower" shall include only the decedent's legal husband, living with or dependent for support upon her at the time of her death.

History. Init. Meas. 1948, No. 4, § 2, Acts 1949, p. 1420; Acts 1975 (Extended Sess., 1976), No. 1227, § 2; 1979, No. 119, § 1; 1981, No. 290, § 1; 1983, No. 444, § 1; 1986 (2nd Ex. Sess.), No. 10, § 1; A.S.A. 1947, § 81-1302; reen. Acts 1987, No. 1015, § 2; Acts 1993, No. 796, § 2; 1995, No. 919, §§ 1, 2; 1997, No. 479, § 8; 1997, No. 832, § 1, 2; 1999, No. 20, § 1; 2001, No. 1757, §§ 1, 2; 2003, No. 1237, § 1; 2005, No. 1250, § 1; 2005, No. 1692, § 1; 2007, No. 546, § 2.

A.C.R.C. Notes. Part of this section was reenacted by Acts 1987, No. 1015, § 2. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Subdivision (5)(C), as originally enacted by Acts 1993, No. 796, § 2, began: "Any and all prior decisions by the Commission

and the Courts inconsistent with the definition of compensable injury as herein set forth are hereby specifically annulled, repealed, and held for naught."

Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Acts 2001, No. 1757, § 12, provided: "All laws and parts of laws expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999."

U.S. Code. Section 3508 of the Internal Revenue Code of 1986, referred to in (9)(B) and (11)(A), is codified as 26 U.S.C. § 3508.

Section 6053 of the Internal Revenue Code of 1954, referred to in (19), is codified as 26 U.S.C. § 6053.

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Legal status of posthumously conceived child of decedent. 17 A.L.R.6th 593.

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CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Applicability.
Applicability of 1993 Amendment.
Arising Out of and in the Course of Employment.
Assaults.
Benefits.
—Major Cause.
Child.
Compensation.
Date or Time of Accident.
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Earning Capacity.
Effect of Amendments.
Employee.
—Casual Employment.
—Election of Noncoverage.
—Evidence.
—Facts Determining Status.
—Minors.
—Partners or Proprietors.
—Sole Proprietor.
Employer.
Employment.
—Agriculture Farm Labor.
—Building.
—Evidence.
—Foreign Jurisdiction.
—Going and Coming Rule.
—Newspapers, etc.
—Number of Employees.
—Performing Employment Services.
—Police Officer.
—Political Subdivisions.
—Public Charities.
—Subcontractor.
Employment Services.
Evidence.
Healing Period.
Injury.
—In General.
—Accident.
—Aggravation.
—Arising Out of and in the Course of Employment.
— —Assaults.

— —Gradual Development.
— —Positional Risk Doctrine.
—Burden of Proof.
—Carpal Tunnel Syndrome.
—Causal Connection.
—Disease.
—Evidence.
—Hemorrhoids.
—Idiopathic Injuries.
—Injury Off Premises.
—Independent Intervening Cause.
—Intoxicants.
—Medical Expenses.
—Mental Injury.
—Preexisting Infirmary.
—Psychological Injury.
—Rapid Repetitive Motion.
—Recurrence.
—Sexual Harassment.
—Specific Incident.
—Work-Related.
Intoxicants.
Legislative Intent.
Major Cause.
Medical Opinions.
Medical Services.
Objective Findings.
Physical Impairment.
Substantial Evidence.
Temporary Total Disability.
Wages.
Widows and Widowers.

Constitutionality.

Prior to the 1981 amendment a widow needed only to be either living with or dependent for support upon her husband at the time of his death to be entitled to compensation, while a widower had to both be living with and dependent upon his wife for support at the time of her death and be incapacitated to support himself for compensation, which was an impermissible gender-based discrimination and violated the fourteenth amendment to the U.S. Constitution and Ark. Const., Art. 2, § 18; however, that portion was severable and the offending words "was incapacitated to support himself" were excised from the section. *Swafford v.*

Tyson Foods, Inc., 2 Ark. App. 343, 621 S.W.2d 862 (1981) (decision prior to the 1981 amendment).

Subdivision (4)(B)(iv) of this section is constitutional since there is a rational basis for the conclusion that the presence of cocaine metabolites is related to intoxication or impairment. *Ester v. National Home Ctrs.*, 335 Ark. 356, 981 S.W.2d 91 (1998).

Construction.

The statutorily-mandated standard of strict construction cannot be applied to subdivision (5) in such a way as to require that a claimant must offer objective medical evidence to prove not only the existence of an injury, but also to show the circumstances under which the injury was sustained and the precise time of the injury's occurrence; subdivision (5) contains many elements that simply are not susceptible of proof by medical evidence supported by objective findings. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

If there is a causal connection between the primary injury and subsequent complication or disability, an activity of the claimant that triggers the subsequent complications must be "unreasonable under the circumstances," in order to be an independent intervening cause under (5)(F)(iii) of this section. *Davis v. Old Dominion Freight Line Inc.*, 69 Ark. App. 74, 13 S.W.3d 171 (2000), *aff'd*, 341 Ark. 751, 20 S.W.3d 326 (2000).

Although subsection (16)(B) of this section provides that medical opinions addressing compensability must be stated within a reasonable degree of medical certainty, a statement by complainant's physician that the accident as described by complainant "could have caused the herniation and need for surgery", met the requirement of (16)(B) of this section. *Frances v. Gaylord Container Corp.*, 69 Ark. App. 26, 9 S.W.3d 550 (2000), *aff'd*, 341 Ark. 527, 20 S.W.3d 280 (2000).

Applicability.

The Arkansas Workers' Compensation Act does not specify what extrastate situations it covers. An employer's liability under the Act, however, is based upon disability or death from an injury arising out of and in the course of employment, and "employment" is defined as every em-

ployment carried on in the state. Therefore, the application of the Arkansas Workers' Compensation Act is limited by its terms to harms arising out of employments carried on in Arkansas. *Patton v. Brown & Root, Inc.*, 31 Ark. App. 141, 789 S.W.2d 745 (1990).

Proceedings before the Workers' Compensation Commission and a workers' compensation claim in Oklahoma are not mutually exclusive, but all states having a legitimate interest in an injury have the right to apply their own rules and standards, either separately, simultaneously or successively. *Robinson v. Ed Williams Constr. Co.*, 38 Ark. App. 90, 828 S.W.2d 860 (1992).

Workers' Compensation Commission's decision to deny worker permanent partial disability benefits was based on a flawed application of subdivision (4)(F)(ii) of this section; although the commission's opinion properly examined the worker's claim regarding the issue of permanent impairment, its conclusions addressed whether the compensable injury was the major cause of the permanent disability or need for treatment such that the commission had to render a conclusion on whether the worker proved entitlement to the permanent partial impairment rating. *Michael v. Keep & Teach, Inc.*, 87 Ark. App. 48, 185 S.W.3d 158 (2004).

Compensation claimant's impairment rating was proper because, in part, pursuant to subdivision (16)(A) of this section, pain, active range-of-motion, and straight-leg-raising tests could not be used for assessment of impairment in workers' compensation cases. *Flowers v. Ark. State Police*, 2010 Ark. App. 99, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 247 (Mar. 10, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 350 (June 17, 2010).

Applicability of 1993 Amendment.

Acts 1993, No. 796 did not apply to employee who sustained one injury in 1992 and a second injury in August 1993, where the second injury was not a new injury but a recurrence of the first and thus was merely a second period of incapacitation. *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S.W.2d 897 (1996).

Prior to 1993, there was a *prima facie* presumption under former § 11-9-707(4)

that an injury did not result from intoxication of the injured employee while on duty; now however, under subdivision (5)(B)(iv) of this section, the presence of an intoxicant creates a rebuttable presumption that the injury or accident was substantially occasioned by the use of the intoxicant. *Weaver v. Whitaker Furn. Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996).

The pre-1993 version of this section did not place on a claimant the burden of proving that there were no physicians licensed in the state who could provide the required treatment before he could seek treatment by an out-of-state physician. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997).

Arising Out of and in the Course of Employment.

Assaults.

Award of workers' compensation benefits to the employee for compensable injuries was appropriate because he did not fall within the exclusion under subdivision (4)(B)(i) of this section since he was not an active participant in the assault against him. Additionally, the risk of assault was increased by the employee's work setting. *Odd Jobs & More v. Reid*, 2011 Ark. App. 450, — S.W.3d — (2011).

Benefits.

Denial of permanent-total disability benefits to the employee was appropriate pursuant to subdivision (4)(F)(ii)(a) of this section because all of her physicians had returned her to work full-duty with no restrictions and no medical provider indicated that she was unable to work. *Greenfield v. Conagra Foods, Inc.*, 2010 Ark. App. 292, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 468 (May 19, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 440 (Sept. 23, 2010).

—Major Cause.

Evidence established that an injury was the major cause of an injured worker's impairment rating where a neurosurgeon testified that an on-the-job injury was the major cause of back surgery and that the surgery was the sole cause of the impairment rating. *Second Injury Fund v. Stephens*, 62 Ark. App. 255, 970 S.W.2d 331 (1998).

Employee's work-related accident was not shown to be the "major cause" of his

knee injury, as required by subdivision (4)(F)(ii)(a) of this section. Substantial evidence showed that the employee had a preexisting degenerative knee condition, particularly in view of his prior knee surgery, degenerative arthritis, and the absence of his medial meniscus and anterior cruciate ligament prior to the more recent surgery, and there was no evidence that the need for knee-replacement surgery and the resulting impairment would not have occurred but for the work-related injury. *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008).

Child.

Dependency includes partial dependency unless it is stated to mean total dependency. *Crossett Lumber Co. v. Johnson*, 208 Ark. 572, 187 S.W.2d 161 (1945) (decision under prior law).

Minor child of deceased natural father was entitled to receive compensation for his death despite adoption by other parties, regardless of whether he was actually dependent on natural father for support. *Holland Constr. Co. v. Sullivan*, 220 Ark. 895, 251 S.W.2d 120 (1952) (decision under prior law).

Although deceased employee had not been supporting stepson, natural daughter and acknowledged illegitimate child, they were entitled to compensation under this chapter. *Chicago Mill & Lumber Co. v. Smith*, 228 Ark. 876, 310 S.W.2d 803 (1958), superseded by statute as stated in, *Pinecrest Mem. Park v. Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983) (decision under prior law).

Niece or nephew did not qualify for compensation benefits under the statute unless he or she had been classified as a foster child. *Ellis v. Ellis*, 251 Ark. 431, 472 S.W.2d 703 (1971).

Evidence was insufficient to overcome the presumption against illegitimacy of the children and the judgment of the trial court was reversed and the case remanded to the commission for it to review the evidence in the light of all the definitions of child. *Spratlin v. Evans*, 260 Ark. 49, 538 S.W.2d 527 (1976).

The addition of the word "actually" in § 11-9-527(c), was intended to change what amounted to a conclusive presumption of dependency under prior cases; it follows that when the child was not living with the employee at the time of his death,

there must be some showing of actual dependency. *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979).

The fact of temporary support by mother did not demonstrate that there was no longer any reasonable expectation of support on the part of the father; the child was not able to act for herself and her necessary expenses would naturally increase as she grew older, with the concurrent possibility that her mother would not be able to maintain the child in her accustomed mode of living. *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979).

Evidence sufficient to support the finding of the commission that claimant was not wholly and actually dependent upon decedent. *Bankston v. Prime W. Corp.*, 271 Ark. 727, 610 S.W.2d 586 (1981).

Evidence not sufficient to support the finding of the commission that claimant was not wholly and actually dependent upon the decedent. *Bankston v. Prime W. Corp.*, 271 Ark. 727, 610 S.W.2d 586 (1981).

Claimant did not sustain burden of proof to establish that she was in any manner a "stepchild" or "foster child." *Bankston v. Prime W. Corp.*, 271 Ark. 727, 610 S.W.2d 586 (1981).

Children were not acknowledged illegitimate children of the deceased. *McCoy on behalf of McCoy v. Logging*, 21 Ark. App. 68, 728 S.W.2d 520 (1987).

Dependency of a stepchild is not a question of law, but a fact issue to be determined by the circumstances existing when the compensable injury occurs; it is based on proof of either actual support from the deceased employee, or a showing of a reasonable expectation of support where there is evidence that the stepchild is being actually supported by her natural parent, or where she has a right to expect support from the natural parent even if it is not actually provided. *Hoskins v. Rogers Cold Storage*, 52 Ark. App. 219, 916 S.W.2d 136 (1996).

Compensation.

The attorney's fees in a workers' compensation case should consist of a percentage of the amounts expended for medical services and hospitalization in addition to a percentage of the cash awarded to the client, since the compensation from which the fees are to be derived include medical

and hospital services. *Ragon v. Great Am. Indem. Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954).

The definition of compensation in this section as including medical services and funeral expenses did not preclude future claims for medical expenses under §§ 11-9-508 — 11-9-517 after a lump sum settlement under § 11-9-804 since that provision only contemplated lump sum settlement of such benefits as were susceptible of determination at that time. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Compensation means the money allowance payable to the employee or his dependents and includes medical payments. *Mohawk Tire & Rubber Co. v. Bridger*, 257 Ark. 587, 518 S.W.2d 499 (1975).

"Compensation" includes the furnishing of medicine only to the extent that it is "reasonably necessary" for treatment of the compensable injury. *Northwest Tire Serv. v. Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988).

Where claimant suffered a compensable injury, received medical treatment, returned to his regular job and continued to work until he became totally disabled, claimant is entitled to the maximum weekly benefit rate in effect at the time the disability occurred, and this rate is based on the wages being earned on the date of the accident. *Montgomery v. Delta Airlines*, 31 Ark. App. 203, 791 S.W.2d 716 (1990).

Denial of the employee's claim for the compensability of a back injury was appropriate under subdivision (4)(B)(iv) of this section because the presence of marijuana metabolites was evidence of the presence of marijuana and the employee failed to overcome the presumption that his injury was caused by the use of illegal drugs. *Jackson v. Smith Blair, Inc.*, 2010 Ark. App. 691, — S.W.3d — (2010).

Date or Time of Accident.

Employee sustained a compensable injury, notwithstanding the contention that he failed to report his injury in a timely fashion and failed to seek medical treatment in a timely fashion, since this contention went to the weight and credibility of the testimony and since the definition of a compensable injury does not require timely reporting or timely treatment. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998).

Where the claimant was injured in 1977, but was able to continue working without loss of income until two accidents which occurred in 1996, his date of accident was 1996 and his compensation rate would be based on his 1996 earnings. *Inskeep v. Emerson Elec. Co.*, 64 Ark. App. 101, 983 S.W.2d 132 (1998).

Workers' Compensation Commission erred in requiring an employee who claimed to have injured his back at work to prove the exact date on which the injury had occurred; it was sufficient under subdivision (4)(A) that the employee could show that the injury had occurred during a specific four-day period. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001).

Disability.

Where, in addition to the loss of use, the permanent partial disability consists also of loss of capacity, because of the injury, to earn wages as defined and set out in subdivision (5); the disability includes, blends with, and is usually greater than the disability occasioned by loss of functional use only. *Wilson & Co. v. Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968).

The mere fact that the claimant was making as much money at the time of the hearing as he was making prior to his injury did not necessarily mean that he had the "capacity" to earn that much. *Abbott v. C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968).

In determining the degree of disability as defined by this section, the mentality of the claimant is material to the wage-loss factor, but congenital mental deficiency does not affect entitlement to compensation because compensation is based on previous earnings and earning capacity and is measured by loss of capacity due to the accident. *Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978).

Disability means not merely functional disability but also loss of the use of the body to earn substantial wages. *Great Plains Bag Corp. v. Ray*, 267 Ark. 943, 593 S.W.2d 51 (Ct. App. 1979).

If claimant is totally incapacitated to earn in the same or any other employment the wages he was receiving at the time of his injury, then he is entitled to receive weekly benefits during the continuance of the total disability. *Sunbeam Corp. v. Bates*, 271 Ark. App. 385, 609 S.W.2d 102 (1980).

The term disability controls compensation awards in all cases of temporary disability except where compensation is statutorily based upon the healing period. *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (Ark. 1981).

Where claimant injured his knee, the injury did not become compensable until claimant suffered a loss of earnings as a result of a nonwork-related injury; thus claim was timely filed. *Shepherd v. East-erling Constr. Co.*, 7 Ark. App. 192, 646 S.W.2d 37 (1983).

A person injured on the job may suffer disability because of a physical loss or because of an inability to earn as much as he was earning when he was hurt and a person can be disabled who has lost either or both. *Terrell v. Austin Bridge Co.*, 10 Ark. App. 1, 660 S.W.2d 941 (1983).

Where claimant was earning higher wages at the time of the hearing than he was at the time of the accident, but claimed he could no longer do the work for which he was trained, whether he had a compensable disability was a question for the commission to determine. *Terrell v. Austin Bridge Co.*, 10 Ark. App. 1, 660 S.W.2d 941 (1983).

Disability which is compensable is based upon incapacity to earn because of injury; the payment of full wages during a compensable disability does not negate the incapacity to earn but may, in proper circumstances, dispense with the requirement that compensation benefits be paid under § 11-9-807. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

Where the claimant undisputedly filed to come within the odd-lot category, in order to prove her entitlement to total disability benefits, the burden remains on her to show that she was incapacitated, because of her injury, to earn, in the same or any other employment, the wages she was receiving at the time of the injury. *Leslie v. Sanyo Mfg. Corp.*, 13 Ark. App. 59, 679 S.W.2d 222 (1984).

A person can be disabled if the injury has caused a physical loss or an inability to earn as much as he was earning when he was hurt; an injury must be more than an anatomical disability, but must be a disability in the compensation sense to be a previous disability, requiring apportionment under this chapter. *State Treasurer,*

Second Injury Fund v. Coleman, 16 Ark. App. 188, 699 S.W.2d 401 (1985).

The Workers' Compensation Commission did not err in holding that worker's congenital dyslexia was not "a previous disability or impairment" which gives rise to a claim against the Second Injury Fund under § 11-9-525, where the worker entered the labor market as an unskilled manual laborer, he was pursuing that employment without diminished earning capacity at the time of his injury, and there was no evidence that the claimant could not have continued in the same or similar employment at the same wage he had always earned had it not been for his injury. *Holley Enters. v. Nicholls*, 19 Ark. App. 97, 717 S.W.2d 495 (1986).

"Disability", in the workers' compensation sense, is not based upon loss of earnings per se, but rather is defined in terms of loss of earning capacity. *Second Injury Fund v. Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987).

Evidence insufficient to support commission's conclusion that plaintiff was not legally disabled. *Boyd v. General Indus.*, 22 Ark. App. 103, 733 S.W.2d 750 (1987).

A work-related disabling angina attack, although temporary, is no less a disability. *Nashville Livestock Comm'n v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990).

Where, although plaintiff would try most any job offered to him, suitable work was not available to him due to a combination of his advancing age, his level of education, his limited experience in one area of the job market, and his disability; therefore he fell within the odd-lot category of workers. *Lewis v. Camelot Hotel*, 35 Ark. App. 212, 816 S.W.2d 632 (1991).

For the purpose of defining disability, "any other employment" means any other employment in lieu of the one in which the employee was injured, not concurrent employment, where an employee is working two jobs when injured, and continues employment in one. *Stevens v. Mountain Home Sch. Dist.*, 41 Ark. App. 201, 850 S.W.2d 335 (1993).

Although the definition of "disability" in subdivision (9) does not include any specific reference to physical impairment, Arkansas case law clearly indicates that both physical and earning impairment are components of "disability." *Golden v. Westark Community College*, 58 Ark. App. 209, 948 S.W.2d 108 (1997), *aff'd* in part,

reversed in part, 333 Ark. 41, 969 S.W.2d 154 (1998).

Workers' Compensation Commission erred in determining that claimant was not entitled to temporary total disability benefits after the date he began receiving unemployment benefits as the claim fell within § 11-9-506(b); thus, the case was remanded to the commission for a factual determination regarding whether claimant remained within his healing period and suffered a total incapacity to earn wages after his receipt of unemployment compensation began. *King v. Peopleworks*, 97 Ark. App. 105, 244 S.W.3d 729 (2006).

Temporary total disability was properly granted in a worker's compensation case due to a disability under subdivision (8) of this section while a claimant remained in his healing period from back surgery and supplemented his income by intermittent work with a family business. He was unable to earn pharmacist wages in other employment. *Walgreen Co. v. Goode*, 2012 Ark. App. 196, — S.W.3d — (2012).

Earning Capacity.

When the claimant returns to work and earns as much as or more than he did prior to his injury, then the necessary and logical inference, absent any contrary evidence, is that the claimant has not suffered a loss of earning capacity; thus, where there was no evidence that the claimant was not doing his job well, that his wage increases were the result of sympathy, or that his earnings were not commensurate with his earning capacity, the claimant failed to establish any compensable injury to his earning capacity. *Bragg v. Evans-St. Clair, Inc.*, 15 Ark. App. 53, 688 S.W.2d 956 (1985).

Effect of Amendments.

Until 1993, a *prima facie* presumption existed that an injury did not result from intoxication of the injured employee while on duty; Acts 1993, No. 796, changed that presumption by deleting former § 11-9-707(4) and amending subdivision (5)(B)(iv) of this section. *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998), review denied, 334 Ark. 35, 970 S.W.2d 807 (1998).

Employee.

In determining whether, at time of injury, individual was an employee or an independent contractor, the act is to be

given a liberal construction in individual's favor, and any doubt is resolved in favor of employment status. *Irvan v. Bounds*, 205 Ark. 752, 170 S.W.2d 674 (1943); *Farrell-Cooper Lumber Co. v. Mason*, 216 Ark. 797, 227 S.W.2d 444 (1950) (preceding cases decided under prior law); *Hollingsworth & Frazier v. Barnett*, 226 Ark. 54, 287 S.W.2d 888 (1956); *Southern Farm Bureau Cas. Ins. Co. v. Tuggle*, 270 Ark. 106, 603 S.W.2d 452 (1980); *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982); *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983); *Franklin v. Arkansas Kraft, Inc.*, 12 Ark. App. 66, 670 S.W.2d 815 (1984).

The general rule is that, where the person rendering assistance to another in an emergency has an interest for his employer in relieving the emergency condition, he does not become an emergency employee of the person to whom he renders the assistance. *Transport Co. v. Arkansas Fuel Oil Co.*, 210 Ark. 862, 198 S.W.2d 175 (1947) (decision under prior law).

The original employer remains liable under this chapter until there has been a reasonable time or course of events for knowledge of change of employer to be brought home to the employee, and the relationship of employer and employee is presumed to continue for a reasonable time after a sale of the business made without the knowledge of the employee. *Ledbetter v. Adams*, 217 Ark. 329, 230 S.W.2d 21 (1950) (decision under prior law).

When a corporate officer's duties involve distinctively nonexecutive, non-supervisory or even manual work, the Workers' Compensation Act should apply. *Benefield Real Estate v. Mitchell*, 269 Ark. 607, 599 S.W.2d 445 (Ct. App. 1980).

Claimant held to be an employee and his injuries covered where claimant was injured while working at employer's personal residence. *Christian v. Arkansas Crane & Crawler*, 55 Ark. App. 306, 935 S.W.2d 1 (1996).

Despite having independent contractor labels and certificates of noncoverage pursuant to subdivision (9)(C) of this section, truck drivers were employees of multiple trucking enterprises owned by one man where the drivers hauled loads exclusively for the owner's motor carriers using trucks leased from the owner's leasing

company with the carrier's logo on them and where the drivers were under their direction and authority. *Steinert v. Ark. Workers' Comp. Comm'n*, 2009 Ark. App. 719, — S.W.3d — (2009), rehearing denied, *Steinert v. Workers' Comp. Comm'n*, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 999 (Dec. 16, 2009), review denied, *Steinert v. Workers' Comp. Comm'n*, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 110 (Feb. 18, 2010).

Deceased worker, who was killed when a felled tree fell on him, was not an employee at the time of the accident, although the employer intended to hire him that day and wages had been discussed, because there was no contract for hire. Therefore, the Workers' Compensation Commission did not have jurisdiction over the worker's estate's claim under subdivision (4)(B)(iii) of this section. *Scroggins v. Glen Roberts Excavation*, 2010 Ark. App. 84, — S.W.3d — (2010).

—Casual Employment.

Employment in building or repairing a structure is not to be regarded as casual where the work for which the claimant was engaged will require a considerable length of time for its completion. *Buxton v. Dean*, 218 Ark. 645, 238 S.W.2d 487 (1951).

Considering the meaning of the word "casual" as used in this section, before an employment is excepted from operation of this chapter, it must be both casual and not in the usual course of the employer's business; therefore claimant injured in the construction of a hangar which was to be used in the company's regular business was regularly employed and not a casual employee. *Aerial Crop Care, Inc. v. Landry*, 235 Ark. 406, 360 S.W.2d 185 (1962).

A blacksmith who shod the employer's horses three or four times a year and was injured by being kicked by such a horse he was shoeing was a casual employee but nevertheless employed in the course of the business of the employer and, therefore, not excluded under subdivision (2). *Meek v. Brooks*, 237 Ark. 717, 375 S.W.2d 671 (1964).

Insurer was not entitled to have jury told that the term employee included "part time, temporary, casual or otherwise." *Security Ins. Co. v. Owen*, 252 Ark. 720, 480 S.W.2d 558 (1972).

The casual employee exclusion from coverage applies only where the employ-

ment is both casual and not in the course of the trade, business, profession, or occupation of his employer. *Purdy v. Livingston*, 262 Ark. 575, 559 S.W.2d 24 (1977).

—Election of Noncoverage.

The form established by Commission regulations for a filing pursuant to subdivision (10) of this section is called an "A-18." *Jenny's Cleaning Serv. v. Reddick*, 46 Ark. App. 5, 875 S.W.2d 856, 880 S.W.2d 876 (1994), superseded, 319 Ark. 123, 889 S.W.2d 754 (Ark. 1994).

The Arkansas Supreme Court has not decided the question of whether filing the A-18 form notice of election with the commission pursuant to subdivision (2) of this section is essential as a matter of law for coverage under this chapter. *Jenny's Cleaning Serv. v. Reddick*, 46 Ark. App. 5, 875 S.W.2d 856, 880 S.W.2d 876 (1994), superseded, 319 Ark. 123, 889 S.W.2d 754 (Ark. 1994).

—Evidence.

Evidence held sufficient to establish status as employee. *Karcher Candy Co. v. Hester*, 204 Ark. 574, 163 S.W.2d 168 (1942); *Lundell v. Walker*, 204 Ark. 871, 165 S.W.2d 600 (1942); *Irvan v. Bounds*, 205 Ark. 752, 170 S.W.2d 674 (1943); *Wood Mercantile Co. v. Cole*, 213 Ark. 68, 209 S.W.2d 290 (1948); *Feazell v. Summers*, 218 Ark. 136, 234 S.W.2d 765 (1950) (preceding cases decided under prior law); *South Ark. Feed Mills, Inc. v. Roberts*, 234 Ark. 1035, 356 S.W.2d 645 (1962); *Garner v. Rogers*, 234 Ark. 1069, 356 S.W.2d 418 (1962); *McGehee Hatchery Co. v. Gunter*, 237 Ark. 448, 373 S.W.2d 401 (1963); *Hale v. Mansfield Lumber Co.*, 237 Ark. 854, 376 S.W.2d 670 (1964); *Southern Farm Bureau Cas. Ins. Co. v. Tuggle*, 270 Ark. 106, 603 S.W.2d 452 (1980); *Curtis v. Ermert Funeral Home & Ins. Co. of N. Am.*, 4 Ark. App. 274, 630 S.W.2d 57 (1982); *Fraternal Order of Eagles v. Kirby*, 6 Ark. App. 198, 639 S.W.2d 529 (1982); *Sands v. Stombaugh*, 11 Ark. App. 38, 665 S.W.2d 902 (1984).

Evidence held insufficient to establish status as employee. *Lockeby v. Ozan Lumber Co.*, 219 Ark. 154, 242 S.W.2d 115 (1951) (decision under prior law); *West v. Lake Lawrence Pulpwood Co.*, 233 Ark. 629, 346 S.W.2d 460 (1961); *Charles v. Lincoln Constr. Co.*, 235 Ark. 470, 361 S.W.2d 1 (1962); *Albert Pike Hotel v. Trat-*

ner, 240 Ark. 958, 403 S.W.2d 73 (1966); *Pearson v. Lake Lawrence Pulpwood Co.*, 247 Ark. 776, 447 S.W.2d 661 (1969); *Sandy v. Salter*, 260 Ark. 486, 541 S.W.2d 929 (1976); *Julian Martin, Inc. v. Indiana Refrigeration Lines*, 262 Ark. 671, 560 S.W.2d 228 (1978); *Stewart v. Cosby-Parsons Quarter Horse Ranch*, 269 Ark. 866, 601 S.W.2d 590 (Ct. App. 1980).

Physician's report diagnosed the workers' compensation claimant with lumbalgia, radiculitis, lumbar subluxation and contained no qualifying words regarding the injury; thus, the physician's report constituted substantial evidence supporting the Workers' Compensation Commission's finding that the claimant sustained a compensable injury under subdivision (4)(D). *Wal-Mart Stores, Inc. v. Stotts*, 49 S.W.3d 667 (2001), substituted opinion, 74 Ark. App. 428, 58 S.W.3d 853 (2001).

Arkansas Workers' Compensation Commission found that, although the manner of a worker's pay was more indicative of an independent contractor, this was outweighed by the control exerted by the business over the worker's assignments. *Riddell Flying Serv. v. Callahan*, 90 Ark. App. 388, 206 S.W.3d 284 (2005).

—Facts Determining Status.

The determination whether the injured individual is an employee or an independent contractor depends on the facts of each case. *Irvan v. Bounds*, 205 Ark. 752, 170 S.W.2d 674 (1943); *Farrell-Cooper Lumber Co. v. Mason*, 216 Ark. 797, 227 S.W.2d 444 (1950) (preceding cases decided under prior law); *Hollingsworth & Frazier v. Barnett*, 226 Ark. 54, 287 S.W.2d 888 (1956); *Moore v. Long Bell Lumber Co.*, 228 Ark. 345, 307 S.W.2d 533 (1957); *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983); *Sands v. Stombaugh*, 11 Ark. App. 38, 665 S.W.2d 902 (1984); *Franklin v. Arkansas Kraft, Inc.*, 12 Ark. App. 66, 670 S.W.2d 815 (1984).

Evidence that company could discharge claimant at will; that the company required him to increase the number of his crew from time to time; paid social security and unemployment insurance taxes and liability insurance on claimant and his men; and the manner in which the company made loans and advances to claimant and members of his crew, were all facts which the commission had a right

to consider in determining the relationship of claimant as an employee. *Farrell-Cooper Lumber Co. v. Mason*, 216 Ark. 797, 227 S.W.2d 444 (1950) (decision under prior law).

The power of an employer to terminate the work at any time without liability is incompatible with the full control of the work that is usually enjoyed by an independent contractor and is a strong circumstance tending to show the subserviency of the worker. *Hollingsworth & Frazier v. Barnett*, 226 Ark. 54, 287 S.W.2d 888 (1956).

The withholding of income taxes, social security taxes, and unemployment taxes is not conclusive or determinative, but are merely circumstances to be considered in determining whether claimant is an employee or an independent contractor. *Smith v. West Lake Quarry & Material Co.*, 231 Ark. 294, 329 S.W.2d 167 (1959).

The right of control, and not its exercise, is a factor in determining whether an employer-employee relationship exists. *Julian Martin, Inc. v. Indiana Refrigeration Lines*, 262 Ark. 671, 560 S.W.2d 228 (1978).

In order to make a factual determination of employment status, it may not be enough, in a particular case, to consider only the question of control. *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982).

Some of the factors which might be considered in determining whether an injured person is an employee or an independent contractor, are: (1) the right to control the means and the method by which the work is done; (2) the right to terminate the employment without liability; (3) the method of payment, whether by time, job, piece or other unit of measurement; (4) the furnishing, or the obligation to furnish, the necessary tools, equipment, and materials; (5) whether the person employed is engaged in a distinct occupation or business; (6) the skill required in a particular occupation; (7) whether the employer is in business; (8) whether the work is an integral part of the regular business of the employer; and (9) the length of time for which the person is employed. *Franklin v. Arkansas Kraft, Inc.*, 5 Ark. App. 264, 635 S.W.2d 286 (1982).

Ordinarily, whether a person is an employee can be determined by the position that person occupies and his relationship

to the alleged employer. However, in those cases where a person occupies more than one position, it becomes necessary to consider the type of work that was actually being done by that person at the time of his injury. *Fraternal Order of Eagles v. Kirby*, 6 Ark. App. 198, 639 S.W.2d 529 (1982).

With respect to the determination of whether a worker is an employee, the factor of the right to control includes several items such as the right to determine the manner of completing the work, right to terminate, right to hire or control the hiring of helpers, the method of payment, and the furnishing of, or the obligation to furnish, tools or equipment necessary to perform the work; in determining the nature of the work relative to the alleged employer's business, some factors to be considered include whether the worker is engaged in a separate and distinct occupation or business, whether the work to be performed is an integral part of the employer's regular business, and the duration of the employment. *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

In determining whether an injured person is an employee or an independent contractor for purposes of workers' compensation insurance, there are a number of factors to be considered; the right to terminate the employment without liability; the method of payment, whether by time, job, piece or other unit of measurement; the right to control the means and the method by which the work is done; the furnishing, or the obligation to furnish, the necessary tools, equipment, and materials. *Sands v. Stombaugh*, 11 Ark. App. 38, 665 S.W.2d 902 (1984).

County sheriff's department was not liable under subdivision (10)(A) for workers' compensation for a deputy sheriff injured when responding to the department's call; the deputy was the employee of an improvement district, had no express or implied contract for hire with the department, and his compensation came entirely from the district. *Sharp County Sheriff's Dep't v. Ozark Acres Improvement Dist.*, 75 Ark. App. 250, 57 S.W.3d 764 (2001), *aff'd*, 349 Ark. 20, 75 S.W.3d 690 (2002).

—Minors.

Since former workers' compensation law included a minor whether lawfully or

unlawfully employed, a minor employee, though employed in violation of the child labor laws, was relegated to remedies afforded by former law for injuries received and could not maintain an action for damages. *Cummings v. J.J. Newberry Co.*, 211 Ark. 854, 203 S.W.2d 187 (1947) (decision under prior law).

The statutory definition of an employee expressly includes a minor, and common-law rules of dependency do not apply; therefore parent of injured minor was entitled to award. *Kimpel v. Garland Anthony Lumber Co.*, 216 Ark. 788, 227 S.W.2d 932 (1950) (decision under prior law).

—Partners or Proprietors.

The fact that father and son were partners in logging operation did not preclude a finding of an employer-employee relationship between the son and the person with whom the logging agreement was made. *Hollingsworth & Frazier v. Barnett*, 226 Ark. 54, 287 S.W.2d 888 (1956).

Evidence supported the commission's finding that the deceased, who died as a result of a work-related injury, was an employee within the meaning of this section, despite the fact that the deceased during the last three years of his life had filed tax returns reflecting that the business was a sole proprietorship. *Continental Ins. Co. v. Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ct. App. 1980).

The terms "sole proprietor" and "self-employed employer," as used in the Workers' Compensation Act, are neither synonymous nor interchangeable. Under subdivision (2) of this section, a "sole proprietor" must file written notice with the Workers' Compensation Commission to be included in the definition of an "employee," while under subsection (b) of § 11-9-108 a "self-employed employer" may agree or contract to exclude himself or herself from coverage. *Gilbert v. Gilbert Timber Co.*, 19 Ark. App. 93, 717 S.W.2d 220 (1986), *aff'd*, 292 Ark. 124, 728 S.W.2d 507 (1987).

Where it was stipulated that the employer was a sole proprietorship, subdivision (2) of this section was applicable, and the claimant, the owner of the sole proprietorship, was required to file written notice to be included within the definition of an "employee" under the Worker's Compensation Act. *Gilbert v. Gilbert Timber*

Co., 19 Ark. App. 93, 717 S.W.2d 220 (1986), *aff'd*, 292 Ark. 124, 728 S.W.2d 507 (1987).

Sole proprietor is subject to this section. *Gilbert v. Gilbert Timber Co.*, 292 Ark. 124, 728 S.W.2d 507 (1987).

After 1979, sole proprietors could be considered employees, but only if they elected to be included in the definition of employees and filed their election with the commission. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (1988).

—Sole Proprietor.

Sole proprietor, who wanted to be covered by workers' compensation insurance and obtained a policy for that purpose, did not necessarily have to file an A-18 form in order to be a covered employee; the employee had substantially complied with this section. *Jenny's Cleaning Serv. v. Reddick*, 46 Ark. App. 5, 875 S.W.2d 856, 880 S.W.2d 876 (1994), superseded, 319 Ark. 123, 889 S.W.2d 754 (Ark. 1994).

Where the appropriate form to be filed with the commission, in compliance with the notice requirement in subdivision (2) of this section, is a Form A-18, and where sole proprietor never listed herself as such on her workers' compensation insurance application, failed to file a Form A-18, and failed to file any kind of written notice to indicate her election to be included in the definition of "employee" as clearly required under subdivision (2), the sole proprietor did not substantially comply with the statutory requirements. *Jenny's Cleaning Serv. v. Reddick*, 319 Ark. 123, 889 S.W.2d 754 (Ark. 1994).

Employer.

Under this chapter, the prime contractor is not the employer of an employee of a subcontractor, and becomes the statutory employer liable for compensation only when the subcontractor has failed to provide workers' compensation insurance. *Carter v. Fraser Constr. Co.*, 219 F. Supp. 650 (W.D. Ark. 1963).

Where the owner of construction equipment supplied it for use on a construction project for which he would receive a percentage of the profits and had general supervision of the use of the equipment he was a joint venturer and was exonerated from tort liability as an employer by this chapter. *Smith v. Rodgers*, 251 Ark. 994, 477 S.W.2d 831 (1972).

By invoking the exclusive remedy provision of the compensation law, joint venturer was discharging his responsibility to claimant as an employee. *Lewis v. Gardner Eng'g Corp.*, 254 Ark. 17, 491 S.W.2d 778 (1973).

Although a sublessee under a trip lease withheld money for compensation coverage to assure that it was paid by the lessee, the sublessee was not estopped from claiming that the lessee trucking company was the employer of the truck-driver for compensation purposes. *Julian Martin, Inc. v. Indiana Refrigeration Lines*, 262 Ark. 671, 560 S.W.2d 228 (1978).

When there is a lease of fully operated equipment for the transportation of cargo on the public highways, the determination of whether the lessee or lessor is the driver's employer for workers' compensation purposes is a question of fact. *Julian Martin, Inc. v. Indiana Refrigeration Lines*, 262 Ark. 671, 560 S.W.2d 228 (1978).

Evidence sufficient to support the commission's finding that the individual defendant should be jointly liable with his two firms and was an employer within the definition of subdivision (1). *Richardson v. Rogers*, 266 Ark. 980, 588 S.W.2d 465 (Ct. App. 1979).

The question of the minimum number of employees in order to qualify as an employer under this chapter is a factual question for the commission and cannot be disturbed on appeal unless unsupported by substantial evidence. *Stewart v. Cosby-Parsons Quarter Horse Ranch*, 269 Ark. 866, 601 S.W.2d 590 (Ct. App. 1980).

In determining whether an individual is an employer or an independent contractor, the relative nature of the work involves consideration of a combination of factors, all of which are utilized so as to give a clearer picture of the parties' relationship than is possible when only control is considered; control of the manner of performing the work is significant, but, if considered determinative or controlling, may lead to clearly wrong results. *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983).

Where general employer, a temporary service, assigned claimant to a special employer, there was no separate contract for hire between claimant and his special employer, so special employer did not have

to share in paying claimant's workers' compensation benefits. *National Union Fire Ins. v. Tri-State Iron & Metal*, 323 Ark. 258, 914 S.W.2d 301 (1996).

Property lessees were properly deemed an employer under subdivision (10) of this section for purposes of a workers' compensation claim by surviving members of a decedent's family, as they had the "right of control" as well as other factors that supported that determination. *Grady v. Estate of Smith*, 2011 Ark. App. 568, — S.W.3d — (2011).

Employment.

This chapter was applicable to death of employee killed by a truck while engaged in construction work for private contractor at a military post in this state. *Young v. G.L. Tarlton, Contractor*, 204 Ark. 283, 162 S.W.2d 477 (1942) (decision under prior law).

The word employment does not have reference alone to actual manual or physical labor, but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do. *Elm Springs Canning Co. v. Sullins*, 207 Ark. 257, 180 S.W.2d 113 (1944) (decision under prior law); *Williams v. Gifford-Hill & Co.*, 227 Ark. 340, 298 S.W.2d 323 (1957).

Where employer's principal place of business and scene of operations was in Arkansas but at time of worker's injury part of employer's business was operating out of state, employer's primary operations, under this section, were in Arkansas and the employment did not cease to be carried on within this state by reason of the out-of-state operations. *Feazell v. Summers*, 218 Ark. 136, 234 S.W.2d 765 (1950) (decision under prior law).

"Course of employment" is defined as relating to the time, place and circumstances under which the injury occurred. *Howard v. Arkansas Power & Light Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987).

Since the premises exception to the going and coming rule had been eliminated, a back injury was not compensable under subdivision (4)(A)(i) of this section where a benefits claimant tripped while emerging from an elevator at her workplace because she was not performing employment services at the time since she had not clocked in or reached her work station; the fact that she had to unlock a door to

enter did not render the claim compensable. Moreover, the fact that she had stopped by a break room first did not matter since she had not begun her work day. *Parker v. Comcast Cable Corp.*, 100 Ark. App. 400, 269 S.W.3d 391 (2007), review denied, 2008 Ark. LEXIS 156 (Ark. Mar. 6, 2008).

Workers' compensation benefits were properly awarded to a claimant, a store manager, under subdivision (4)(A)(i) of this section, after the claimant was injured escorting a 16-year-old employee to her vehicle in the parking lot after dark because watching the young employee to ensure her safety at night benefitted the employer by ensuring the safety of a trained and valuable employee, and by helping establish a record of safety on the premises. *CV's Family Foods v. Caverly*, 2009 Ark. App. 114, 304 S.W.3d 671 (2009).

In a workers' compensation action, a finding that the employee was not performing employment services when she was injured was inappropriate pursuant to subdivision (4)(A)(i) of this section because she was injured in an area where employment services were expected of her. Checking the mailbox and fax machine at the end of the day advanced the employer's interests and it did not matter that the employee had already clocked out because the testimony proved that she often worked off of the clock and that she checked the mailbox and fax machine each day after clocking out. *Barrett v. C.L. Swanson Corp.*, 2010 Ark. App. 91, — S.W.3d — (2010).

Finding that the employee failed to prove a compensable injury to her right knee in a workers' compensation action was appropriate pursuant to subdivision (4)(B)(iii) of this section because, at the time that she injured herself, she was merely walking outside to take a smoke break. The employer imposed no work requirements on the employee while she took her breaks and she was not advancing the interests of the employer at the time that she was injured. *Haynes v. Ozark Guidance Ctr., Inc.*, 2011 Ark. App. 396, — S.W.3d — (2011).

—Agriculture Farm Labor.

Floriculture and horticulture are embraced within the term agriculture as used in former Workers' Compensation

Act. *Gwin v. J.W. Vestal & Son*, 205 Ark. 742, 170 S.W.2d 598 (1943).

Exemption of agricultural farm labor was not, because of the inclusion of the work "farm," intended to restrict the exemption to those engaged in the growing of ordinary farm crops. *Gwin v. J.W. Vestal & Son*, 205 Ark. 742, 170 S.W.2d 598 (1943).

Night watchman at greenhouses for a firm engaged in business described as florists, nursery and farming, was specifically exempted from former Workers' Compensation Act. *Gwin v. J.W. Vestal & Son*, 205 Ark. 742, 170 S.W.2d 598 (1943) (decision under prior law).

Crop duster airplane pilot employed by an independent contractor who sells crop dusting service to farmers in not an agricultural farm laborer and so is entitled to workers' compensation benefits for injuries arising out of and in the course of his employment. *Dockery v. Thomas*, 226 Ark. 946, 295 S.W.2d 319 (1956).

Where employee was injured in employer's sawmill business which was located on employer's farm, employee was not engaged in farm labor at the time of the injury. *Comer v. Pierce*, 227 Ark. 926, 302 S.W.2d 547 (1957).

Defendant who was engaged in the raising of chickens was engaged in agriculture farm labor and thus claimant who received injury arising out of and in the course of employment cannot recover compensation. *Franklin v. McCoy*, 234 Ark. 558, 353 S.W.2d 166 (1962).

An employer who was engaged exclusively in the hatching and sale of chickens was not engaged in agriculture within the meaning of subdivision (3)(A). *McGehee Hatchery Co. v. Gunter*, 237 Ark. 448, 373 S.W.2d 401 (1963).

Agriculture farm labor does not come within the purview of this chapter. *McGehee Hatchery Co. v. Gunter*, 237 Ark. 448, 373 S.W.2d 401 (1963).

Employee who is an agricultural farm laborer is excluded from workers' compensation coverage. The question of whether employee is engaged in an "employment" in "agricultural farm labor" is one of law. *Griffith v. International Cattle Embryo, Inc.*, 23 Ark. App. 58, 742 S.W.2d 124 (1988).

Exception of agricultural farm labor is broader than mere cultivation of soil; however, it does not cover farm when it is

operated as mere sideline to commercial business. *Griffith v. International Cattle Embryo, Inc.*, 23 Ark. App. 58, 742 S.W.2d 124 (1988).

—Building.

Where person who had engaged in farming rented his farm and built two houses which he intended to rent and supervised their construction, he was engaged in "building or building repair work" within the meaning of this chapter. *Buxton v. Dean*, 218 Ark. 645, 238 S.W.2d 487 (1951).

—Evidence.

The burden rests upon the party seeking benefits to prove the injury sustained was the result of an accident arising out of and in the course of the employment. *Howard v. Arkansas Power & Light Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987).

—Foreign Jurisdiction.

An Arkansas resident came under this chapter even though his injury occurred in another state in which all of his employment was performed. *International Paper Co. v. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971).

Where Arkansas resident, employed by foreign corporation, was injured on job in another state, evidence sufficient to sustain an award by the commission under this chapter. *Missouri City Stone, Inc. v. Peters*, 257 Ark. 917, 521 S.W.2d 58 (1975).

Where claimant was injured while working in another state and the only circumstance bearing on jurisdiction was that claimant was an Arkansas resident, and facts connecting the state with the employment per se were entirely lacking, the statutory basis required for the commission's jurisdiction was absent. *Patton v. Brown & Root, Inc.*, 31 Ark. App. 141, 789 S.W.2d 745 (1990).

The Workers' Compensation Commission did not have jurisdiction over a claim arising from an injury at a truck stop in Arkansas where (1) the claimant truck driver was an Alabama resident who was hired in Georgia by a Texas company, (2) the employer was not localized in Arkansas and did not maintain an office exercising general supervision and control of its employees while in Arkansas, and (3) the claimant testified only that she "thought" she was making a delivery in Arkansas.

Baker v. Frozen Food Express Transp., 63 Ark. App. 100, 974 S.W.2d 487 (1998), substituted opinion, 981 S.W.2d 101 (Ark. Ct. App. 1998).

—Going and Coming Rule.

The going and coming rule provides that, since all persons are subject to the same street hazards while traveling, injuries sustained by employees going to and coming from work cannot ordinarily be said to arise out of and in the course of the employment within the meaning of the workers' compensation law. *Fisher v. Proksch*, 20 Ark. App. 80, 723 S.W.2d 852 (1987).

Injury during a trip which serves both a business and a personal purpose is within the course of employment if the trip involves the performance of a service for the employer which would have caused the trip to be taken by someone even if it had not coincided with the personal journey. Such a claimant falls within the "dual purpose" exception to the "going and coming" rule, and therefore his injuries are compensable. *Fisher v. Proksch*, 20 Ark. App. 80, 723 S.W.2d 852 (1987).

The basic premise of the going and coming rule is that employees having fixed hours and places of work are generally not considered to be in the course of their employment while traveling to and from work. *Howard v. Arkansas Power & Light Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987).

Employees whose work entails travel away from the employer's premises are within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. *Howard v. Arkansas Power & Light Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987).

The exception to the going and coming rule permitting recovery for injuries received by employees traveling between two parts of an employer's premises, such as by way of a public street, was applicable where, prior to July 1, 1993 (the effective date of the amendment to subdivision (5)(B)(iii)), employee was struck by a car after parking in employer's parking lot. *Wentworth v. Sparks Regional Medical Ctr.*, 49 Ark. App. 10, 894 S.W.2d 956 (1995).

Even though the going and coming rule ordinarily precludes recovery for an injury

sustained while the employee is going to or returning from his place of employment, where the journey is part of the service and/or where the employee furnishes his own conveyance, the employee's travel is usually determined to be within the course of employment. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997).

Claimant's injury arose within the course of employment and thus was compensable where her vehicle overturned when she was traveling to her job of providing in-home care. *Olsten Kimberly Quality Care v. Pettey*, 328 Ark. 381, 944 S.W.2d 524 (1997).

Workers' compensation benefits were denied as employee failed to prove the compensability of his claim because an exception to the "going and coming rule" did not apply simply based on the use of a company vehicle and the fact that the employee was on call the night before; moreover, the premises exception was no longer good law. *Farler v. City of Cabot*, 95 Ark. App. 121, 234 S.W.3d 352 (2006).

To the extent that the "going and coming rule" prevents recovery for injuries sustained while the employee was furthering the interests of the employer, it is overruled by the Arkansas Supreme Court. *Moncus v. Billingsley Logging*, 366 Ark. 383, 235 S.W.3d 877 (2006).

Employee who was following his employer's vehicle so he could locate the jobsite was carrying out the express directions of his employer at the time of his fatal auto accident, even though he was not then engaged in the activity for which he was primarily employed; thus, his death was compensable. *Moncus v. Billingsley Logging*, 366 Ark. 383, 235 S.W.3d 877 (2006).

—Newspapers, etc.

A boy delivering newspapers has no Workmen's Compensation under subdivision (3)(A). *Clark v. Arkansas Democrat Co.*, 242 Ark. 133, 413 S.W.2d 629 (1967).

—Number of Employees.

Officers of company counted toward the minimum number of regularly employed employees. *Aerial Crop Care, Inc. v. Landry*, 235 Ark. 406, 360 S.W.2d 185 (1962).

Where employer employed only four employees the commission did not have jurisdiction over him. *Lofton v. Bryan*, 237

Ark. 376, 373 S.W.2d 145 (1963) (decision prior to 1976 amendment).

Where substantial evidence showed that there was a minimum of five employees who qualified appellant as an employer, he was covered by the compensation law. *Donaldson v. Socia*, 254 Ark. 158, 492 S.W.2d 253 (1973) (decision prior to 1976 amendment).

The determinative factor in ascertaining the requisite number of employees is whether three persons are regularly employed in the same business. *Stewart v. Cosby-Parsons Quarter Horse Ranch*, 269 Ark. 866, 601 S.W.2d 590 (Ct. App. 1980); *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (1988).

Minimum number of employees found by combining employees of two related businesses owned by the same employer. *Humphries v. Bray*, 271 Ark. 962, 611 S.W.2d 791 (1981).

The question of whether the employer has the minimum number of employees in order to subject that employer to the requirements of this chapter is a factual determination for the commission. *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982).

Shareholders held to be employees. *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982).

Where the record showed that only three individuals were involved with the corporation or its operations in any capacity, and the commission found that one was not sufficiently active in the business to be counted as an employee, the employer did not have the number of employees needed for coverage under subdivision (3). *Wright v. ABC Air, Inc.*, 44 Ark. App. 5, 864 S.W.2d 871 (1993).

—Performing Employment Services.

Whatever "performing employment services" may mean in the context of subdivision (5)(B)(iii), it must include the performance of those functions which are essential to the success of the enterprise in which the employer is engaged. *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1996), *aff'd*, 328 Ark. 381, 944 S.W.2d 524 (1997).

Claimant was not entitled to compensation for slipping and falling on ice in the employer's parking lot; walking to and from one's car, even on the employer's

premises, does not qualify as performing services. *Hightower v. Newark Pub. Sch. Sys.*, 57 Ark. App. 159, 943 S.W.2d 608 (1997).

The claimant was performing employment services when he was struck by a vehicle while transporting the results of a physical examination, required by and solely for the benefit of his employer, to the employer. *Fisher v. Poole Truck Line*, 57 Ark. App. 268, 944 S.W.2d 853 (1997).

Plaintiff was not performing "employment services" at the time of her motor vehicle accident where she drove to a mall on her break for a personal errand and was injured on her way back to work. *Coble v. Modern Bus. Sys.*, 62 Ark. App. 26, 966 S.W.2d 938 (1998).

Employee, who tripped over a rolled-up carpet while exiting an elevator while on the way to a designated smoking area in the building in which she worked, was not performing employment services. *Harding v. City of Texarkana*, 62 Ark. App. 137, 970 S.W.2d 303 (1998).

A school custodian was performing employment services when he fell while entering his school upon his arrival at the start of his work day, where the custodian testified that one of his duties was to disarm the alarm system when he entered the building. *Shults v. Pulaski County Special Sch. Dist.*, 63 Ark. App. 171, 976 S.W.2d 399 (1998).

An employee was performing employment services when he slipped and fell while on his way to an area adjacent to his work station so that he could smoke a cigarette during his work break as the employee was forced to remain near his immediate work area because no relief worker was available. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

When an employee is doing something that is generally required by his or her employer, the claimant is providing employment services. *White v. Georgia-Pacific Corp.*, 339 Ark. 474, 6 S.W.3d 98 (1999).

A claimant was performing an incidental activity which was inherently necessary for the performance of his primary employment activity; therefore, the claimant was entitled to benefits where he fell while moving items from a truck with a spring ride suspension system to a truck with an air ride suspension system. *Ray v.*

Wayne Smith Trucking, 68 Ark. App. 115, 4 S.W.3d 506 (1999).

An employee was not performing employment services when he was involved in an automobile accident while traveling to his place of employment on a Monday morning since (1) although he had some contracts in the car which he had worked on during the weekend, neither working on those contracts over the weekend nor transporting them in his car was something he was required to do as part of his job or even something that his employer had asked him to do, and (2) a cellular telephone call made by the employee to his employer to inform them that he would be late was no more than a common courtesy. *Campbell v. Randal Tyler Ford Mercury, Inc.*, 70 Ark. App. 35, 13 S.W.3d 916 (2000).

It is patently improper to summarily pronounce that all claims involving "personal comfort" or "personal convenience" accidents are outside the course of employment and, therefore, are non-compensable without regard for the underlying facts; by the same logic, it is improper to hold that all personal-comfort or personal-convenience accidents are within the course of employment and are compensable, no matter what the facts in individual cases may be; it should be common knowledge that determining the relevant factors for finding the facts in disputed cases under subdivision (4)(B)(iii), is a singularly judicial function rather than legislation. *Matlock v. Ark. Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

The "employment services" requirement of subdivision (4)(B)(iii), simply reflects the broader requirement that an accident must occur in the course of employment to be compensable; although it is true that "personal comfort" or "personal convenience" cases raise the "employment services" question, workers are entitled to compensation benefits based on injuries from accidents that occurred when they are not performing actual job tasks, and even when the accident occurred away from the employer's premises; the fact that a worker is injured while attempting to satisfy a personal need is not, per se, dispositive regarding whether she was performing employment services when the accident occurred; similarly, the fact that a worker is not directly

compensated for the activity engaged in when an accident occurs for which workers' compensation benefits are sought is not controlling as to whether the worker was performing employment services; on the other hand, merely walking to and from one's car, even on the employer's premises, does not automatically constitute performing employment services. *Matlock v. Ark. Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

Workers' Compensation Commission erred in construing subdivision (4)(B)(iii) to require a denial of benefits where worker went to office restroom on next floor because the one on her floor was occupied, and upon returning to her desk, fell and hurt her back. *Matlock v. Ark. Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

Where employee was performing an incidental activity, inherently necessary for the performance of her job, an injury that occurred was compensable and did not provide a basis to circumvent the exclusive remedy provisions of § 11-9-105 so that she could file a civil action against her employer. *Privett v. Excel Specialty Prods.*, 76 Ark. App. 527, 69 S.W.3d 445 (2002).

Employee who was struck by a cart being pushed by a co-worker while the employee was placing her purse in her locker before returning to work after a scheduled break was performing employment services within the meaning of subdivision (4)(b)(iii) of this section and was entitled to workers' compensation for her injury. *Wal-Mart Stores v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002).

Employee's injury, suffered from a fall near a time clock, was compensable because the employee was performing employment services at the time of the accident; the evidence showed that the employer required the employee to show an identification badge at two stations, walk down a hallway, and punch a time clock, and it was not determinative that the employee was not paid for performing such duties. *Caffey v. Sanyo Mfg. Corp.*, 85 Ark. App. 342, 154 S.W.3d 274 (2004).

Fact that claimant was coming off a break when his injury occurred did not determine compensability, but rather, because claimant was crossing a board which was placed over a ditch for that purpose, in order to return to work, the

claimant's action in crossing the board was an activity that directly advanced his employer's interests and constituted employment services; because claimant was performing employment services at the time of his injury, an award of benefits was required under subdivision (4)(A)(i) of this section. *Wallace v. West Fraser South, Inc.*, 90 Ark. App. 38, 203 S.W.3d 646 (2005), *aff'd*, 365 Ark. 68, 225 S.W.3d 361 (2006).

Where evidence showed that employee was strongly encouraged to take her breaks in the employee lounge, the injuries employee sustained as she was walking to the lounge were compensable; employee was performing employment services within the meaning of subdivision (4)(B)(iii) of this section. *Wal-Mart Stores, Inc. v. King*, 93 Ark. App. 101, 216 S.W.3d 648 (2005).

Employee's injury was compensable where, with the agency's knowledge and implicit consent, she was clearly performing a service for her own agency client that she was specifically contracted to perform and did so during her agency-scheduled hours; it was manifestly unjust to deny employee benefits where she was injured performing a service for which she could lose her job had she not performed these same services. *Brotherton v. White River Area Agency on Aging*, 93 Ark. App. 432, 220 S.W.3d 219 (Dec. 14, 2005).

Employee was performing employment services at the time of her injury at an offsite meeting where the employer hosted the event, considered it mandatory, and paid employees to attend, and the employee was engaging in conduct permitted and anticipated by the employer; thus, the employee was entitled to benefits. *Engle v. Thompson Murray, Inc.*, 96 Ark. App. 200, 239 S.W.3d 561 (2006).

—Police Officer.

Policeman who was prohibited from performing his duties as an officer because of a suspension, and who was injured during a drug raid, a prohibited act not only forbidden by his written suspension but unknown to and unaccepted by his superior, was acting outside the scope and course of his employment when he was injured. *Arkansas State Police v. Davis*, 45 Ark. App. 40, 870 S.W.2d 408 (1994), *rehearing denied*, 46 Ark. App. 320, 879 S.W.2d 473 (1994).

—Political Subdivisions.

School districts fell within the provision of subdivision (3)(A) excluding political subdivisions of the state from coverage. *Muse v. Prescott Sch. Dist.*, 233 Ark. 789, 349 S.W.2d 329 (1961).

School district was not a state agency and its employees were not state employees within the meaning of § 11-5-309 extending this chapter to employees of the state and its agencies. *Muse v. Prescott Sch. Dist.*, 233 Ark. 789, 349 S.W.2d 329 (1961).

This chapter does not provide coverage for teachers in the public schools. *Muse v. Prescott Sch. Dist.*, 233 Ark. 789, 349 S.W.2d 329 (1961).

—Public Charities.

The Workers' Compensation Commission, in its finding that a hospital was not an exempt public charity, was not supported by substantial evidence. *Marion Hosp. Ass'n v. Lamphier*, 15 Ark. App. 14, 688 S.W.2d 322 (1985).

Fees paid to a voluntary ambulance service by the county emergency medical services district did not prevent the service, as a matter of law, from being an institution maintained and operated "wholly" as a public charity, and there was substantial evidence to support the decision that the service was exempt from liability under the workers' compensation law because of the exception provided by subdivision (3)(A)(iii). *Sloan v. Voluntary Ambulance Serv.*, 37 Ark. App. 138, 826 S.W.2d 296 (1992).

—Subcontractor.

A cleaning service that cleaned for a company which required their subcontractors to carry workers' compensation insurance or allow a percentage to be taken from their checks to cover workers' compensation insurance under its policy was subject to the Workers' Compensation Act by virtue of being a subcontractor employing one or more employees under former subdivision (3)(D) (see now subdivision (12)(D)) of this section. *Jenny's Cleaning Serv. v. Reddick*, 46 Ark. App. 5, 875 S.W.2d 856, 880 S.W.2d 876 (1994), superseded, 319 Ark. 123, 889 S.W.2d 754 (Ark. 1994).

Summary judgment entered in favor of the United States Postal Service (USPS) was reversed as the USPS could not be

considered a special employer of the injured contractor's employee when there was no evidence of an express or implied contract between the employee and the USPS. *Phillips v. United States*, 422 F.3d 709 (8th Cir. 2005).

Employment Services.

There was no err in finding that the decedent's death was compensable under workers' compensation, because it was undisputed that the decedent was within the time and space boundaries of his employment, and finished with his break and en route to receive further instructions, which constituted performance of employment services. *Mitchell v. Tyson Poultry, Inc.*, 104 Ark. App. 327, 292 S.W.3d 848 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 723 (Mar. 18, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 483 (June 4, 2009).

In a case in which an employer appealed a decision by the Arkansas Workers' Compensation Commission awarding benefits in favor of an employee, she was not performing employment services at the time she fell and sustained her injury while on a smoke break; rather than waiting in line as directed by her employer to receive her paycheck, she took a purely personal break, and there was no evidence that she was on-call during the break. The decision of the Commission was not supported by substantial evidence. *Jonesboro Care & Rehab Ctr. v. Woods*, 2010 Ark. App. 236, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 313 (Apr. 7, 2010), superseded, 2010 Ark. 482, — S.W.3d — (2010).

Evidence.

Fair-minded persons could not reach the Workers' Compensation Commission's conclusion to deny benefits to a worker who claimed injuries to his back and right leg resulting from a work-related accident because: (1) the worker's testimony, corroborated by his supervisor, was that he did not suffer from back or right leg problems prior to the accident; (2) the commission's finding that there was no "documented report" of the worker's back complaints until six months after the work incident was unsupported; and (3) the absence of testimony from representa-

tives of the employer's workers' compensation carrier, who were within the employer's control, raised the presumption that their testimony would have been unfavorable to the employer. *Barnes v. Greenhead Farming*, 101 Ark. App. 129, 270 S.W.3d 873 (2008), rehearing denied, *Barnes v. Greenhead Farming, Inc.*, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 160 (Feb. 13, 2008).

Record did contain objective medical findings sufficient to establish compensability, and the Arkansas Workers' Compensation Commission did not err in finding that the employee proved compensability or in relying on the physician's impairment rating; giving the physician's testimony its maximum effect, as the substantial-evidence standard required the appellate court to do, this would place the employee at the end of his healing period no later than July 28, 2007. *United Farms, Inc. v. Gist*, 2009 Ark. App. 717, — S.W.3d — (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 998 (Dec. 9, 2009), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 94 (Feb. 12, 2010).

Employee was properly awarded workers' compensation benefits under subdivision (4)(D) of this section because the employee had proven a compensable injury to the employee's left elbow and was entitled to all reasonably necessary medical treatment related to the injury; the employee's physician stated that the injury was greater than 51 percent caused by the initial injury at work and failed conservative treatment necessitating surgical repair. *Pafford Med. Billing Servs. v. Smith*, 2011 Ark. App. 180, — S.W.3d — (2011).

Healing Period.

The court's finding that an employee's healing period had not ended was improper, where it was based at least in part, upon a response by a rehabilitation agency to the court's personal inquiry whether that agency could undertake a therapeutic work program for the employee. *Bibler Bros. v. Ingram*, 266 Ark. 969, 587 S.W.2d 841 (1979).

Temporary total disability and the healing period in workers' compensation cases are not the same time periods in all cases; temporary total disability is that period within the healing period in which the

employee suffers a total incapacity to earn wages under subdivision (5) and § 11-9-519. *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (Ark. 1981).

The determination of when the healing period has ended is a factual determination that is to be made by the commission; if that determination is supported by substantial evidence, it must be affirmed on appeal. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), superseded by statute as stated in, *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984); *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996) (decided under prior law) *CDI Contractors v. McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993); *Arkansas Hwy. & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition, the healing period has ended; the persistence of pain may not of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), superseded by statute as stated in, *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984) (decided under prior law) *Arkansas Hwy. & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

Since injured claimant's healing period had ended, claimant could not be entitled to additional temporary total disability benefits. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), superseded by statute as stated in, *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984) (decided under prior law) *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987); *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

The Workers' Compensation law does not authorize award of current total or limited total disability benefits after the end of the healing period. The concept of current total disability benefits seems to have been based on *McNeely v. Clem Mill & Gin Co.*, 241 Ark. 498, 409 S.W.2d 502

(1966); to the extent that McNeely has been interpreted as holding that temporary benefits regardless of how they are denominated may be paid after the end of the healing period that interpretation is erroneous. *Arkansas Secretary of State v. Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987).

Recurring symptoms may give rise to a subsequent healing period, after the original one has ended. Where a second complication is found to be a natural and probable result of the first injury, the employer remains liable, and this liability includes liability for additional temporary benefits when the employee undergoes a second, distinct healing period. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

A healing period has not ended so long as treatment is administered for the healing and alleviation of a condition. *Arkansas Hwy. & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993); *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997).

Employee's healing period ended a year and a half after he failed to lose the amount of weight necessary to allow treatment of his underlying injury. *Shepherd v. Van Ohlen Trucking*, 49 Ark. App. 36, 895 S.W.2d 945 (1995).

The healing period continues until the employee is as far restored as the permanent character of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

Substantial evidence supported commission's conclusion that the employee had not reached the end of his healing period. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

Healing period held to end three months after surgery on an entrapped nerve. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

Evidence did not support the commission's finding that the healing period for the claimant's injured wrist had ended. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997).

The healing period in which a claimant suffers a complete inability to earn wages includes the time until the employee is as

far restored as the permanent character of the injury will permit; once the underlying condition is more stable and will not improve with further treatment, the healing period is over. *Dallas County Hosp. v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001).

Whether a claimant's healing period has ended is a factual question that is resolved by the workers' compensation commission. *Dallas County Hosp. v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001).

Employee was still within her healing period and entitled to an award of temporary total disability benefits where only one of several doctors determined that she had reached maximum medical improvement; other doctors had diagnosed her with spinal stenosis, an acute, severe back pain secondary to a partially ruptured disc, herniation, and disc degeneration with posterior annular tears, and had noted that employee was unable to work since the time of injury, although several attempts had been made for her to return to work. *Dallas County Hosp. v. Daniels*, 74 Ark. App. 177, 47 S.W.3d 283 (2001).

Temporary total disability benefits were properly awarded to employee who fell off a ladder and landed on a concrete floor where she presented substantial evidence that she was temporarily totally disabled and in a healing period, as defined by subdivision (12) of this section, from the time of injury until the day she was released to return to work. *Fred's, Inc. v. Jefferson*, 361 Ark. 258, 206 S.W.3d 238 (2005).

Arkansas Workers' Compensation Commission's decision that employee was not entitled to temporary-total-disability compensation was reversed as none of the doctors who testified at the hearing agreed that employee had reached the end of his healing period. *Clairday v. The Lilly Co.*, 95 Ark. App. 94, 234 S.W.3d 347 (2006).

Finding against the employee in his workers' compensation action was appropriate under subdivision (12) of this section and § 11-9-526 because there was substantial evidence to support the finding that the employee failed to avail himself of the opportunity to work and that he was not entitled to temporary disability after May 8, 2008. A release to work stated that the employee be provided jobs within

his sedentary restrictions and both the employee and his manager testified that he left that work with various complaints of inability to perform. *Watts v. Sears Roebuck & Co.*, 2011 Ark. App. 529, — S.W.3d — (2011).

Employee's misconduct, which resulted in termination, did not amount to a refusal of suitable employment for the purpose of receiving TTD benefits from April 28, 2008 through August 6, 2008; the employee proved that the employee was still in the healing period under subdivision (12) of this section and was totally incapacitated from earning wages. *Tyson Poultry, Inc. v. Narvaiz*, 2012 Ark. 118, — S.W.3d — (2012).

Arkansas Workers' Compensation Commission did not err in finding that an employee proved entitlement to additional medical and TTD benefits under subdivision (12) of this section for a lower back injury that was sustained while working as a concrete finisher; the medical evidence and the employee's testimony demonstrated that the employee remained within the healing period since the date of the injury. *Webb v. Webb*, 2012 Ark. App. 207, — S.W.3d — (2012).

Injury.

Deceased worker's statutory beneficiaries were entitled to recover workers' compensation benefits under § 11-9-527 because a compensable injury was suffered under subdivision (4)(A)(i) of this section when the worker died in a fire in her living quarters at a hotel where she was employed, even though she was off-duty at the time. Under the increased-risk doctrine for residential employees, the worker's fatal injury was compensable as a residential employee who indirectly advanced the interests of her employer. *Jivan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007).

Where a benefits claimant did not show a specific incident at work that caused him to have tingling and burning in his hands, he failed to demonstrate that he had a compensable accidental injury under this section; the injury could have been sustained in a 1995 fall or any other time. *Weaver v. Nabors Drilling USA & F.A. Richards & Assocs.*, 98 Ark. App. 161, 253 S.W.3d 30 (2007).

Reversal of an award of workers' compensation benefits to the employee was

appropriate pursuant to subdivision (4)(E) of this section because she failed to prove a compensable injury by a preponderance of the evidence. The Workers' Compensation Commission determined that the employee was not a credible witness, and it noted the medical opinions of two doctors who testified that the employee's work activity did not cause or aggravate her carpal tunnel syndrome. *Stutzman v. Baxter Healthcare Corp.*, 99 Ark. App. 19, 256 S.W.3d 524 (2007).

Workers' compensation benefits were properly awarded to an employee where the employee's knee injury was accidental under subdivision (4)(A)(i) of this section; there was uncontradicted evidence that the employee had to climb the stairs regularly. There was no dispute that the employee did not have any problems with the knee when the employee started work in the morning. *Cedar Chem. Co. v. Knight*, 99 Ark. App. 162, 258 S.W.3d 394 (2007), *aff'd*, 372 Ark. 233, 273 S.W.3d 473 (2008).

Knee injury was compensable under subdivision (4)(A)(i) of this section where a workers' compensation claimant testified that he felt pain while descending a flight of stairs at work; the claimant's testimony was found to be credible, and he testified that he was required to ascend and descend multiple flights of stairs per day during a 12-hour shift. *Cedar Chem. Co. v. Knight*, 372 Ark. 233, 273 S.W.3d 473 (2008).

Court of appeals erred in overturning an award of workers' compensation benefits to an employee who was struck by a gate and pinned under it where, in attempting to unlock the gate and provide access to a back entrance to a parking lot, the employee was advancing the employer's interests by allowing other workers to enter or exit the parking lot; the employee sustained a compensable injury under subdivision (4)(A)(i) of this section. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008).

Where the employee was involved in a motor vehicle accident while riding to get a tractor from another job site, the fact that the employee was directly advancing his employer's interests trumped any application of the going-and-coming rule. The Court of Appeals of Arkansas held that the injury arose out of and in the course of employment for purposes of subdivision (4)(A)(i) of this section; the fact

that the employee was not being paid at the time of the accident was of no consequence. *Witt v. Allen & Son, Inc.*, 2009 Ark. App. 561, — S.W.3d — (2009).

Where claimant was bitten by a horse while working at racing stables, she obtained jobs with other employers and continued to seek medical treatment for her arm. The Arkansas Workers' Compensation Commission did not err by denying her claim for benefits one year after the horse bite, because the record showed no causal connection between the horse bite and claimant's physical scars or the assessment of radial palsy; therefore, claimant failed to meet her burden of proving a compensable injury under subsection (4) of this section. *Cossey v. Gary A. Thomas Racing Stable*, 2009 Ark. App. 666, 344 S.W.3d 684 (2009).

There was evidence that an employee told another employee and a doctor that the employee's back injury occurred over a weekend while bike riding, the employee had never stated to either the company doctor or the employee's own doctor that the source of the back injury was caused by repetitive job duties and/or by specific incident, and the Workers' Compensation Commission did not find the employee's testimony as to the work-related source of the back injury credible; therefore, under either subdivision (4)(A)(i) or (ii) of this section, the employee had not met her burden of proving a compensable work-related injury. *Alecia Clark v. San Antonio Shoes, Inc. Commerce Indust. Ins. Co.*, 2009 Ark. App. 689, — S.W.3d — (2009).

Under subdivision (4)(B)(iv)(a) of this section, the employee's injury was not compensable as the accident was substantially occasioned by the use of methamphetamine; the doctor testified that enough methamphetamine was circulating in the employee's system at the time of the accident and would have affected his judgment. *Hickey v. Gardisser Constr.*, 2009 Ark. App. 725, — S.W.3d — (2009).

When the employee's left shoulder was injured when a door-hanging mechanism fell, three co-workers witnessed the incident and it was immediately reported to his supervisor; after surgery, a doctor assessed a five-percent whole-person-impairment rating. The Arkansas Workers' Compensation Commission's decision that he sustained a compensable injury under subdivision (4)(D) of this section was sup-

ported by the evidence; he was entitled to temporary-total-disability benefits. *Potlatch Corp. v. Word*, 2009 Ark. App. 772, 359 S.W.3d 426 (2009).

Arkansas Workers' Compensation Commission had a substantial basis upon which to deny a claim for additional medical and temporary-total disability benefits because the workers' compensation benefits claimant underwent two MRIs, and there were new objective findings on the second MRI, according to the radiologist who reviewed both MRIs, and the doctor related claimant's need for treatment to the new injury; the Commission, reviewing the evidence *de novo*, found that no causal connection between the primary injury and the subsequent disability was shown, eliminating the need to address claimant's conduct. *Griffith v. Medcath, Inc.*, 2009 Ark. App. 777, — S.W.3d — (2009).

Substantial evidence supported the Workers' Compensation Commission's decision that a claimant, who stepped outside a seminar room to smoke a cigarette, was performing employment services at the time of her injury. A reasonable person could reach the same decision as the Commission and find that the claimant was continuing to advance her employer's interests, at least indirectly, by remaining on the premises until she had received her paycheck, filled out any necessary paperwork, and clocked out. *Jonesboro Care & Rehab Ctr. v. Woods*, 2010 Ark. 482, — S.W.3d — (2010).

Arkansas Workers' Compensation Commission erred in finding that an employee was not performing employment services for her employer when she was injured at the beginning of a mandatory break because the employee was doing something generally required by the employer; by the employer's own admission, the mandatory breaks were given so that all employees could take care of personal business, including getting something to drink or using the restroom, at the same time, which provided a direct benefit to the employer, and while the employee was not required to work during her break, she was required to take a break because the plant shut down. *Dearman v. Deltic Timber Corp.*, 2010 Ark. App. 87, — S.W.3d — (2010).

In a case in which a workers' compensation claimant fell and broke her hip

when she stepped outside to revive herself, the Arkansas Workers' Compensation Commission's determination that the claimant was not performing employment services at the time of her injury was not supported by substantial evidence. The claimant testified that she exited the building for the sole purpose of regaining alertness, that testimony was supported by all of the evidence, and there was no evidence that she stepped outside the hospital for any purpose related to her own personal comfort or convenience. *Hudak-Lee v. Baxter County Reg'l Hosp.*, 2010 Ark. App. 121, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 268 (Mar. 17, 2010), vacated, *Hudak-Lee v. Baxter County Reg'l Hosp. & Risk Mgmt. Res.*, 2011 Ark. 31, — S.W.3d — (2011).

Decision of the Arkansas Workers' Compensation Commission to award an employee benefits for medical treatment and temporary total disability was supported by substantial evidence because it was for the Commission to determine the credibility of the employee's testimony, and it accepted as credible the employee's version of events; although the employee could not recall the exact location of the incident and did not immediately report the injury to his supervisor, the Commission found credible his claim that he jarred his back when he stepped off of a sidewalk. *Mack-Reynolds Appraisal Co. v. Morton*, 2010 Ark. App. 142, — S.W.3d — (2010).

Finding against the employee in his workers' compensation action was appropriate pursuant to subdivisions (4)(A)(i) and (B)(iii) of this section because he was not engaged in employment services at the time of his injury. At the time of the injury the employee had completed his daily tasks and had clocked out; he also stated that he was neither on call nor subject to being recalled into the plant. *Rhodes v. Commercial Metals Co.*, 2010 Ark. App. 198, — S.W.3d — (2010).

Finding in a workers' compensation action that the employee failed to prove that she sustained a compensable injury to her left knee when she slipped and fell at work was improper pursuant to subdivisions (4)(A)(i) and (4)(B)(iii) of this section because substantial evidence did not support the conclusion that the employee's hug was a deviation and that the deviation

was not complete at the time of her fall. *Wood v. Wendy's Old Fashioned Hamburgers*, 2010 Ark. App. 307, — S.W.3d — (2010).

Arkansas Workers' Compensation Commission erred in finding that an employee established that she sustained a gradual-onset injury to her right shoulder and in awarding her benefits because there was a lack of substantial evidence supporting its opinion that the employee's bus driver job duties were rapid and repetitive; while the evidence of the employee's opening and closing the bus door touched on the repetitive nature of her job, there was no evidence about the time interval between each event, and that evidence failed to establish the rapidity requirement of subdivision (4)(A)(ii)(a) of this section. *Pulaski County Special Sch. Dist. v. Stewart*, 2010 Ark. App. 487, — S.W.3d — (2010).

Substantial evidence supported Arkansas Workers' Compensation Commission's finding that a claimant's climbing a ladder two to three times a day, two to three days a week, was not rapid, repetitive motion for purposes of compensability under subdivision (4)(A)(ii)(a) of this section. *Jenkins v. It's Fashion*, 2010 Ark. App. 746, — S.W.3d — (2010).

Arkansas Workers' Compensation Commission properly held that an employee failed to prove that the employee sustained a compensable injury to the employee's elbow under subdivision (4)(A)(i) of this section because treatment notes reflected that the employee complained of shoulder pain and popping; a physician's report stated that an examination of the elbow showed full and painless range of motion with no crepitating. *Morgan v. Highland Window*, 2010 Ark. App. 797, — S.W.3d — (2010).

Arkansas Workers' Compensation Commission's finding that a claimant did not suffer a compensable injury when she fell and broke her hip during her break because she was not performing employment services was not supported by substantial evidence. By taking a short break to revive herself in order to complete her shift, she was advancing the interests of her employer. *Hudak-Lee v. Baxter County Reg'l Hosp. & Risk Mgmt. Res.*, 2011 Ark. 31, — S.W.3d — (2011).

Workers' compensation benefits were properly awarded to an employee, a truck driver, for a compensable injury in the

form of a heart attack, pursuant to subdivision (14)(A) of this section; although the employee had previously assisted, on a single occasion, with changing a mud flap, the employee had not been required to perform such a duty in as hot an environment as that present on the day in question. The employee replaced it alone with less than ideal tools for the job. *J Mar Express, Inc. v. Poteete*, 2011 Ark. App. 122, — S.W.3d — (2011).

Claim for workers' compensation benefits for a knee injury was properly denied under subdivisions (4)(A)(i), (D), and (E)(i) of this section because the employee failed to prove that the injury occurred in the course of employment; employee's supervisor testified that the employee stated that the employee had gout in the knee and had hurt the knee playing football when the employee was younger. *Montgomery v. J & J Lumber Co.*, 2011 Ark. App. 129, — S.W.3d — (2011), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 242 (Mar. 30, 2011).

Claimant's action for workers' compensation benefits was properly denied as he failed to establish a compensable injury pursuant to subdivision (4) of this section. The claimant did not offer evidence of objective medical findings that established that an on-the-job incident aggravated his preexisting medical condition. *Grothaus v. Vista Health, L.L.C.*, 2011 Ark. App. 130, — S.W.3d — (2011).

Substantial evidence supported the Arkansas Workers' Compensation Commission's denial of benefits to a claimant on the ground that the claimant had failed to establish that he sustained a compensable back injury as a result of a fall or from performing numerous strenuous activities during his employment as the claimant did not report a back injury to the employer until nearly three months after his fall, and he did not relate the injury to his fall or any specific incident at work. Moreover, the claimant had worked for the employer for only one and a half years while he had performed equally strenuous work for another employer for twenty-seven years, and he reported back pain several years before he began working for the employer. *Smith v. Commercial Metals Co.*, 2011 Ark. App. 218, — S.W.3d — (2011).

Finding that the employee failed to prove a compensable injury to her right

knee in a workers' compensation action was appropriate pursuant to subdivision (4)(A)(i) of this section because, at the time that she injured herself, she was merely walking outside to take a smoke break. The employer imposed no work requirements on the employee while she took her breaks and she was not advancing the interests of the employer at the time that she was injured. *Haynes v. Ozark Guidance Ctr., Inc.*, 2011 Ark. App. 396, — S.W.3d — (2011).

Sufficient evidence in the record supported the Arkansas Workers' Compensation Commission's finding that an employee's exposure to cobalt dust while at work aggravated his preexisting chronic obstructive pulmonary disease where, in addition to the medical opinions regarding causation, an Occupational Safety and Health Administration study found that the amount of dust in the workplace exceeded acceptable limits, the employee testified that the employer's overhead-exhaust system was not functioning for a period of time while he was exposed to dust, and there was also testimony that an employee who held the employee's job prior to him likewise experienced breathing problems. *Qualserv Corp. v. Rich*, 2011 Ark. App. 548, — S.W.3d — (2011).

Award of temporary total disability benefits to an employee was supported by substantial evidence that the injury arose out of and in the course of employment, and that it was the major cause of the disability or need for treatment pursuant to subdivision (4)(E)(ii) of this section. *Cooper Tire & Rubber Co. v. Strickland*, 2011 Ark. App. 585, — S.W.3d — (2011).

Workers' compensation claimant did not show that he suffered a compensable injury under subdivision (4)(A)(i) of this section, as a radiologist stated that the x-rays taken immediately after the work-related incident did not show that the condition of the claimant's knee was any worse or different than it was two years before. *Kelley v. Courtyard Marriott*, 2011 Ark. App. 715, — S.W.3d — (2011).

Finding that the employee's injury was not the result of rapid repetitive motion was inappropriate pursuant to subdivision (4)(A) of this section because he was required to walk back and forth across a field over and over all day long and that repetitive motion met the requirement of being rapid as well. The only reasonable

conclusion was that the fast-paced repetitive walking caused a blister as a result of the rapid motion of the ill-fitting boots rubbing against his toe. *Pearson v. Worksource*, 2011 Ark. App. 751, — S.W.3d — (2011).

Employee whose feet became infected, allegedly due to water run-off on his apron and shoes during his employment at a poultry plant, failed to carry his burden under § 11-9-704(c) of proving that the infection and hospitalization was caused by exposure to water at work, as opposed to a continuation of a preexisting diabetic infection for which the employee had been hospitalized a month earlier. *Serrano v. George's and Corckett Adjustment*, 2011 Ark. App. 784, — S.W.3d — (2011).

Denial of workers' compensation benefits to the employee was inappropriate because substantial evidence did not support the finding that there was not enough evidence of record to rebut the presumption that the injury was occasioned by the presence of illegal drugs in the employee's system under subdivision (4)(B)(iv)(a) of this section. *Gentry v. Ark. Oil Field Servs.*, 2011 Ark. App. 786, — S.W.3d — (2011).

Arkansas Workers' Compensation Commission did not err in finding that an employee had not proved that a back injury occurred in the course of the employee's employment as a truck driver because the employee's testimony regarding the nature of the employee's complaints conflicted with the employee's statements to medical providers. *Flynn v. J. B. Hunt Transp.*, 2012 Ark. App. 111, — S.W.3d — (2012).

There was substantial evidence to support the decision that appellee employee suffered a compensable aggravation of her preexisting cervical problems, because the employee complained of pain in her neck when she first sought medical treatment the day after her accident and her doctor's opinion that the pain in her neck and shoulder was work-related was stated with a reasonable degree of medical certainty under subdivision (16)(B) of this section. *Ozark Natural Food v. Pierson*, 2012 Ark. App. 133, — S.W.3d — (2012).

Doctor's opinion that claimant's carpal-tunnel injuries were directly related to her job as an ultrasound technician stated a causal link between the condition and claimant's employment duties for pur-

poses of this section, and provided substantial evidence in support of the decision to award her for medical treatment and disability benefits. *Ouachita County Med. Ctr. v. Murphy*, 2012 Ark. App. 135, — S.W.3d — (2012).

Denial of workers' compensation benefits related to the employee's back injury was proper because the objective medical evidence indicated a three-month gap between the date of the accident and the report of the injury, calling into question whether his injury was a result of the work-related accident. Because the medical records made no mention of the ladder incident until the back injury was discovered in June 2010, his testimony was the only evidence linking the injury to the fall and given the three-month span, reasonable persons might disagree as to the actual cause of the injury; thus, he failed to meet his burden under subdivision (4)(E) of this section to prove compensability under subdivision (4)(A)(i). *Luster v. Ben E. Keith Co.*, 2012 Ark. App. 197, — S.W.3d — (2012).

Denial of workers' compensation benefits related to the employee's back injury was proper because the objective medical evidence indicated a three-month gap between the date of the accident and the report of the injury, calling into question whether his injury was a result of the work-related accident. Because the medical records made no mention of the ladder incident until the back injury was discovered in June 2010, his testimony was the only evidence linking the injury to the fall and given the three-month span, reasonable persons might disagree as to the actual cause of the injury; thus, he failed to meet his burden under subdivision (4)(E) of this section to prove compensability under subdivision (4)(A)(i). *Luster v. Ben E. Keith Co.*, 2012 Ark. App. 197, — S.W.3d — (2012).

Finding that the claimant in a workers' compensation action suffered a compensable injury to his spine and was entitled to medical services and temporary total disability benefits was appropriate because a 2007 MRI showed that he sustained a herniated cervical disc, which constituted an objective finding under subdivision (4)(D) of this section. The claimant presented several physician opinions that linked his cervical problems and his need for treatment to the 2004 incident and

established that he was temporarily totally disabled. *Ga. Pac. Corp. v. Lawhon*, 2012 Ark. App. 206, — S.W.3d — (2012).

—In General.

Evidence sufficient to find job-related injury. *Harding Glass Co. v. Moore*, 230 Ark. 796, 327 S.W.2d 8 (1959); *Bradham Drilling Co. v. Powell*, 231 Ark. 555, 331 S.W.2d 35 (1960); *Tri State Ins. Co. v. Employers Mut. Liab. Ins. Co.*, 254 Ark. 944, 497 S.W.2d 39 (1973); *Emerson Elec. Co. v. Williams*, 270 Ark. 65, 603 S.W.2d 443 (1980).

Evidence insufficient to find job-related injury. *John Bishop Constr. Co. v. Orlicek*, 224 Ark. 182, 272 S.W.2d 820 (1954); *Ocoma Foods v. Grogan*, 253 Ark. 1111, 491 S.W.2d 65 (1973); *Lybrand v. Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979).

Separate injuries or conditions that occur simultaneously or near in time to each other can be compensable, even where the injuries are located in the same body member. *Tyson Foods, Inc. v. Griffin*, 61 Ark. App. 222, 966 S.W.2d 914 (1998).

Order awarding temporary total disability benefits to an employee was upheld because it was undisputed that the employee sustained an accidental injury, as defined by subdivision (4)(A)(i) of this section, when she fell off a ladder and landed on her back on a concrete floor as treatment, medication and physical therapy were prescribed. *Fred's, Inc. v. Jefferson*, 361 Ark. 258, 206 S.W.3d 238 (2005).

—Accident.

The words accidental injury mean something happening without the design of, and being unforeseen and unexpected by, the person to whom the injury happens. *Hagger v. Wortz Biscuit Co.*, 210 Ark. 318, 196 S.W.2d 1 (1946) (decision under prior law).

Injury to heart by breathing excessive amounts of dust was not one which appellee might have reasonably expected or anticipated and was therefore accidental within the meaning of former Workers' Compensation Law although it continued over a period of years. *Batesville White Lime Co. v. Bell*, 212 Ark. 23, 205 S.W.2d 31 (1947) (decision under prior law).

Injury was not due to accident where evidence showed that injury was not due to any specific incident but was the result

of heavy lifting over a period of time in the normal course of employment. *Stallings Bros. Feed Mill v. Stovall*, 221 Ark. 541, 254 S.W.2d 460 (1953).

An injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary. *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956); *Spencer v. Plainview Lumber Co.*, 239 Ark. 1039, 396 S.W.2d 943 (1965); *Young v. Heekin Canning Co.*, 13 Ark. App. 199, 681 S.W.2d 419 (1985).

Accidental injury means every injury to an employee arising out of and in the course of his employment except those injuries caused by his intoxication or by his willful intention to bring about the injury or death of himself or another. *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956).

The adjective accidental refers to and modifies the noun injury, and does not refer to the cause of the injury. There is no statutory requirement that the cause of injury itself must have also been accidental. *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956).

Claimant did not prove by a preponderance of evidence that she experienced a compensable injury under subdivision (5)(A)(i), caused by a specific incident and identifiable by time and place of occurrence, as opposed to experiencing a gradual injury. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Substantial evidence supported Arkansas Workers' Compensation Commission's decision finding that employee was entitled to benefits as the Commission found the brother's testimony that the accident was unavoidable to be credible and the presence of drugs did not controvert the claim for benefits. *Apple Tree Serv. v. Grimes*, 94 Ark. App. 190, 228 S.W.3d 515 (2006).

—Aggravation.

An aggravation is a new injury resulting from an independent incident; the independent incident must be shown to be work-related, and, under subdivision (5)(A)(i), it must be shown that the accidental injury was caused by a specific incident identifiable by time and place of occurrence. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

Award of benefits to the employee in a workers' compensation action was proper where substantial evidence supported the determination that the employee sustained an aggravation of her pre-existing condition; the positive bone scan was an objective medical finding of injury that was out of the employee's control and it formed the basis for the recommendation of surgery. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003).

Workers' Compensation Commission erred in finding that the employee had failed to prove a casual connection between her compensable injury and her need for total-knee-replacement surgery; the employer and insurer had to take the employee as they found her, and the compensable injury that she suffered was a factor in her need for the additional surgery. *Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004).

Denial of the employee's permanent benefits was error where the employee's back disease did not require surgery or any other medical treatment prior to the compensable aggravation; there was no evidence that the employee was assigned any rating for his pre-existing stenosis, and there was evidence that his impairment resulted from the aggravation that caused the need for surgery. *Pollard v. Meridian Aggregates*, 88 Ark. App. 1, 193 S.W.3d 738 (2004).

There was substantial evidence that claimant suffered a new injury and a compensable aggravation resulting from the independent incident where claimant testified that, after squatting down and opening his laptop on February 7, 2001, he started to get up and was knocked to the ground by severe pain in his back and right side; his testimony that his back was "crooked" following the severe pain experienced in the incident was credible and his physical therapist stated that he observed a decreased lumbar lordosis on March 5, 2001. *King v. Peopleworks*, 97 Ark. App. 105, 244 S.W.3d 729 (2006).

—Arising Out of and in the Course of Employment.

When the servant acts with reference to the services for which he is employed and for the purpose of performing the work of his employer, and not for any independent purpose of his own, but merely for the

benefit of his master, acts done in such circumstances are within the scope of the servant's employment, but the master is not responsible where a servant acts without reference to the service for which he is employed, but to effect some independent purpose of his own. *Lundell v. Walker*, 204 Ark. 871, 165 S.W.2d 600 (1942).

Injury held not to be within scope. *Birchett v. Tuf-Nut Garment Mfg. Co.*, 205 Ark. 483, 169 S.W.2d 574 (1943), overruled in part, *Southern Cotton Oil Div. v. Childress*, 237 Ark. 909, 377 S.W.2d 167 (Ark. 1964) (cases decided under prior law); *Duke v. Pekin Wood Prods. Co.*, 223 Ark. 182, 264 S.W.2d 834 (1954); *Grace v. Mt. Holly Lumber Co.*, 239 Ark. 519, 390 S.W.2d 105 (1965); *West Tree Serv., Inc. v. Hopper*, 244 Ark. 348, 425 S.W.2d 300 (1968); *Bentley v. Henderson*, 251 Ark. 203, 471 S.W.2d 548 (1971); *Owosso Furn. Co. v. Townsend*, 251 Ark. 265, 471 S.W.2d 752 (1971); *Moseley Auto Sales & Serv. v. Vines*, 254 Ark. 885, 497 S.W.2d 19 (1973); *Queen v. Royal Serv. Co.*, 13 Ark. App. 274, 682 S.W.2d 779 (1985); *Burks v. Anthony Timberlands, Inc.*, 21 Ark. App. 1, 727 S.W.2d 388 (1987); *Lytle v. Arkansas Trucking Servs.*, 54 Ark. App. 73, 923 S.W.2d 292 (1996).

To be compensable the alleged injury must not only arise in the course of the employment, but also out of the employment. *Barrentine v. Dierks Lumber & Coal Co.*, 207 Ark. 527, 181 S.W.2d 485 (1944), overruled in part, *Southern Cotton Oil Div. v. Childress*, 237 Ark. 909, 377 S.W.2d 167 (Ark. 1964) (decision under prior law).

The burden of proof is on a claimant to show that injury or death of an employee was the result of an accidental injury that not only arose in the course of the employment, but in addition, that it grew out of, or resulted from, the employment. *Duke v. Pekin Wood Prods. Co.*, 223 Ark. 182, 264 S.W.2d 834 (1954); *Burks v. Anthony Timberlands, Inc.*, 21 Ark. App. 1, 727 S.W.2d 388 (1987).

Burden was on claimant to show accident occurred in the course of employment. *American Cas. Co. v. Jones*, 224 Ark. 731, 276 S.W.2d 41 (1955).

An accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of

his health, provided the exertion is either the sole or a contributing cause of the injury. *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956); *Young v. Heekin Canning Co.*, 13 Ark. App. 199, 681 S.W.2d 419 (1985).

Injury held to be within scope of employment. *Williams v. Gifford-Hill & Co.*, 227 Ark. 340, 298 S.W.2d 323 (1957); *United Steelworkers v. Walden*, 228 Ark. 1024, 311 S.W.2d 787 (1958); *Malvern Brick & Tile Co. v. Lowery*, 230 Ark. 857, 327 S.W.2d 86 (1959); *Alma Canning Co. v. Hanna*, 233 Ark. 996, 350 S.W.2d 166 (1961); *Southern Cotton Oil Div. v. Childress*, 237 Ark. 909, 377 S.W.2d 167 (Ark. 1964); *Georgia-Pacific Corp. v. Craig*, 243 Ark. 538, 420 S.W.2d 854 (1967); *Arkansas Foundry Co. v. Cody*, 251 Ark. 57, 470 S.W.2d 812 (1971); *American Red Cross v. Wilson*, 257 Ark. 647, 519 S.W.2d 60 (1975); *Westark Specialties, Inc. v. Lindsey*, 259 Ark. 351, 532 S.W.2d 757 (1976); *Purdy v. Livingston*, 262 Ark. 575, 559 S.W.2d 24 (1977); *Saint Vincent Infirmary v. Carpenter*, 268 Ark. 951, 597 S.W.2d 126 (Ct. App. 1980); *J. & G. Cabinets v. Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ct. App. 1980); *Benton Serv. Ctr. v. Pinegar*, 269 Ark. 768, 601 S.W.2d 227 (1980); *Marshall v. Ouachita Hosp.*, 269 Ark. 958, 601 S.W.2d 901 (Ct. App. 1980), overruled in part, *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Meyer's Bakery, Inc. v. Pratt*, 6 Ark. App. 421, 644 S.W.2d 299 (1982); *P.A.M. Transp. v. Miller*, 24 Ark. App. 163, 750 S.W.2d 417 (1988).

When an injury or disability is caused by exertion arising from the employment, whether the exercise is normal or extraordinary, the injury is compensable. *Arkansas-Best Freight System v. Shinn*, 235 Ark. 314, 357 S.W.2d 661 (1962).

There is no presumption that a claim for workers' compensation comes within the purview of the law, i.e., that it arose out of and in the course of the claimant's employment. *O.K. Processing, Inc. v. Servold*, 265 Ark. 352, 578 S.W.2d 224 (1979).

The phrase arising out of the employment refers to the origin or cause of the accident and the phrase in the course of the employment refers to the time, place and circumstances under which the injury occurred; in order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of

the employment and a natural result of one of its risks. *J. & G. Cabinets v. Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ct. App. 1980).

Activities of a personal nature, not forbidden but reasonably to be expected, may be a material incident of the employment and injuries suffered in the course of the activities are compensable, the fact that the injury is suffered during a lunch break, when the employee is not required to be on the premises, does not alter this principle since the controlling issue is whether the activity is reasonably expectable so as to be an incident of the employment, and thus in essence a part of it. *J. & G. Cabinets v. Hennington*, 269 Ark. 789, 600 S.W.2d 916 (Ct. App. 1980).

The workers' compensation commission should follow a liberal approach in determining whether the accident in fact grew out of and occurred in the course of the employment and it is the duty of the commission to draw all legitimate inferences possible in favor of the claimant and to give the claimant the benefit of doubt. *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

Minor acts of horseplay do not automatically constitute departures from employment but may be found to be insubstantial. Whether initiation of horseplay is a deviation from one's course of employment depends on (1) the extent and seriousness of the deviation; (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty); (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some such horseplay. *Ringier Am. v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993).

The fact that an injured employee may have been the instigator of, rather than a mere participant in horseplay, will not necessarily render the injury noncompensable. *Ringier Am. v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993).

Claimant's injuries, sustained when a tornado destroyed a mobile home where he resided on the premises of his employer, arose out of and in the course of his employment. *Deffenbaugh Indus. v. Angus*, 313 Ark. 100, 852 S.W.2d 804 (1993).

A teacher was performing employment services when she fell in the school parking lot while retrieving her glasses where she had reported to work, had supervised children before the bell rang beginning school, was given an assignment after reporting to the librarian, and had injured herself in efforts taken to complete the assignment. *Crossett Sch. Dist. v. Fulton*, 65 Ark. App. 63, 984 S.W.2d 833 (1999).

Substantial evidence supported the determination that the claimant was not engaged in employment services at the time of her injury where she was injured when she slipped on a wet floor during her lunch break while attending a two week instructional seminar. *Beaver v. Benton County Child Support Unit*, 66 Ark. App. 153, 991 S.W.2d 618 (1999).

A food service worker at a university was performing employment services at the time that she slipped in a puddle of salad dressing; she was getting a snack from the cafeteria to eat during her 15 minute break because she was paid for her breaks and was required to assist students on her break if the need arose. *Ray v. University of Ark.*, 66 Ark. App. 177, 990 S.W.2d 558 (1999).

The Commission erred in finding that claimant failed to prove that her condition arose out of and in the course of her employment as required by (5)(A)(ii) of this section where there was little, if any, evidence to suggest that her carpal tunnel syndrome was caused by anything other than work at UPS. *Lloyd v. UPS*, 69 Ark. App. 92, 9 S.W.3d 564 (2000).

The gradual onset for back injuries specified in subdivision (4)(A)(ii)(b) does not apply to injuries to the neck or cervical spine; recognized medical definitions have very clearly defined the term "back" as being below the neck or from the neck to the pelvis. *Hapney v. Rheem Mfg. Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000).

Pursuant to subdivision (4)(A)(i), there was substantial evidence to support the Workers' Compensation Commission's finding that the claimant's need for medical treatment was directly and causally related to an incident that occurred at work. *Wal-Mart Stores, Inc. v. Stotts*, 49 S.W.3d 667 (2001), substituted opinion, 74 Ark. App. 428, 58 S.W.3d 853 (2001).

Under subdivision (4)(B)(iii), an employee's injury that occurred while he was on a restroom break was not excluded

from the definition of "compensable injury" because the injury did not occur at a time when he was not performing employment services; the restroom break was a necessary function and directly or indirectly advanced the interests of his employer. *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002).

Employee did not suffer an injury arising out of or in the course of his employment, as defined by subdivision (4)(A)(i) where he was not performing employment services at the time of the injury but rather he chose to jump over tube sheeting to retrieve his soda so that he could go on his smoke break; therefore, he was properly denied workers' compensation benefits. *McKinney v. Trane Co.*, 84 Ark. App. 424, 143 S.W.3d 581 (2004).

Where Department of Correction employee was injured while travelling to a required staff meeting at his normal place of work on his day off, he was properly denied workers' compensation benefits; merely traveling to and from the workplace was not a covered activity under the workers' compensation statutes and it was not clear that the "special errand" exception was still valid after the passage of Acts 1993, No. 796, which revised the definition of a "compensable injury." *Linton v. Ark. Dep't of Corr.*, 87 Ark. App. 263, 190 S.W.3d 275 (2004).

Where employee who was employed as a freight hauler was "off the clock" and taking a mandated eight-hour overnight rest break when the accident occurred in a motel bathroom, his injury was not compensable; the appellate court noted that the accident was no different from one which could have occurred at the employee's home during his off hours. *Cook v. ABF Freight Sys. Inc.*, 88 Ark. App. 86, 194 S.W.3d 794 (2004).

Given the evidence that the injury occurred before the claimant's work shift had started, and while claimant was outside the territorial jurisdiction of the sheriff's department by which he was employed, the Workers' Compensation Commission could reasonably have concluded that his injury was sustained at a time when employment services were not being performed. *Maupin v. Pulaski County Sheriff's Office*, 90 Ark. App. 1, 203 S.W.3d 668 (2005).

Workers Compensation Commission erred in denying employee's claim for ben-

efits as employee was injured in an area in which employment services were expected of her and she was furthering her employer's interests when she was injured; an employee may be compensated for an injury that occurs even before she reaches her work station or before she is "on the clock" if she is performing a service that is required by her employer and is directly or indirectly advancing her employer's interests. *Foster v. Express Pers. Servs.*, 93 Ark. App. 496, 222 S.W.3d 218 (2006).

Where benefits claimant had been required to attend a corporate meeting and demonstration prior to his scheduled shift, injuries he suffered in a car accident on the way to work from the demonstration were compensable because he was on a special errand and traveling from one job site to another; thus, the going-and-coming rule did not preclude the award of benefits. *Jones v. Xtreme Pizza*, 97 Ark. App. 206, 245 S.W.3d 670 (2006).

Slip and fall injury did not arise out of and in the course of employment, as required by subdivision (4)(A)(i) of this section, because appellant truck driver was not advancing his employer's interests in any way while he was operating a vending machine away from the area in which his truck was being unloaded. While in the break room, he could not have seen his truck had someone hit it, he could not have seen any damage inflicted upon the products being unloaded, and he was not in an area where he could have determined whether someone needed him to move the truck for any reason. *Hill v. LDA Leasing, Inc.*, 2010 Ark. App. 271, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 443 (May 12, 2010).

Pursuant to subdivision (4)(B)(iii) of this section, a truck driver's injury—caused when he fell while buying snack crackers at a vending machine—was not compensable because it was inflicted upon him at a time when employment services were not being performed. The act of pushing the vending machine buttons could not be said to directly or indirectly advance the interests of his employer. *Hill v. LDA Leasing, Inc.*, 2010 Ark. App. 271, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 443 (May 12, 2010).

Whatever an employee's deviation from his driving route might have been when

he stopped his truck to visit his sick grandmother, the employee's act of attempting to put out a fire on the employer's truck was the performance of employment services, for which he was entitled to compensation under subdivision (4)(A)(i) of this section. *Gaskins v. Jeff Minner Trucking*, 2010 Ark. App. 471, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 592 (July 28, 2010).

— — Assaults.

In the cases of assaults, the positional risk doctrine applies only when the risk is neutral; neutral means that the risk which caused the injury was neither personal to the claimant nor distinctly associated with the employment. In other words, before the doctrine will be applied there must be no evidence that the assault was personal and no evidence that the assault was work related. *Pigg v. Auto Shack*, 27 Ark. App. 42, 766 S.W.2d 36 (1989).

Claimant, a maintenance worker and security guard, was injured in the course of his employment when he was assaulted by a trespasser who refused to leave the property; because the risk of assault was increased by the nature of the claimant's work, the injury arose out of his employment. *Bryan v. Best Western/Coachman's Inn*, 47 Ark. App. 75, 885 S.W.2d 28 (1994).

An assault arises out of the employment either if the risk of assault is increased by the nature or setting of the work (regardless of the reason for the assault), or if the reason for the assault was a quarrel having its origin in the work; the test is an alternative one and the satisfaction of either condition will render injuries received as the result of an assault compensable. *Bryan v. Best Western/Coachman's Inn*, 47 Ark. App. 75, 885 S.W.2d 28 (1994).

Actions of employee who was injured while attempting to break up a fight between her son and another worker, both of whom were also employees, were held to be in the best interests of the employer and thus the injury arose out of and in the course of employment. *Pilgrims Pride Corp. v. Calderera*, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

An employee was entitled to benefits for injuries sustained in an incident in which

another employee pulled a chair out from under her while she was changing from work clothes into street clothes as the injured employee was not an "active participant" in the assault that caused her injury. *Flowers v. Arkansas Hwy. & Transp. Dep't*, 62 Ark. App. 108, 968 S.W.2d 660 (1998).

In a workers compensation action, a bank teller failed to establish that she suffered a compensable injury under subdivision (4)(A)(i) of this section when a gunman attacked her in her home and she injured her wrist as she fled. She was not within the scope of her employment as there was no evidence that he was after her bank key or vault codes. *Gingras v. Liberty Bank*, 2011 Ark. App. 65, — S.W.3d — (2011).

— Gradual Development.

Arkansas law has long upheld the compensability of gradual injuries which arise out of and in the course of employment. *Marcoc v. Bell Int'l*, 48 Ark. App. 33, 888 S.W.2d 663 (1994).

The gradual-onset exception for back injuries does encompass injuries to the cervical spine. *Hapney v. Rheem Mfg. Co.*, 341 Ark. 548, 26 S.W.3d 771 (2000).

Employee's compensable gradual-onset injury was established by her testimony regarding the physical requirements of her job and an MRI showing a disc herniation not previously present. *Wal-Mart Stores, Inc. v. Leach*, 74 Ark. App. 231, 48 S.W.3d 540 (2001).

— Positional Risk Doctrine.

The positional risk doctrine does not provide a new ground for recovery, but allows a presumption to arise in favor of compensation where the accident causing the injury was unexplainable. *Pigg v. Auto Shack*, 27 Ark. App. 42, 766 S.W.2d 36 (1989).

The positional risk doctrine provides a method of satisfying the "in the course of" requirement where the source of the injury is unexplained. An injury "arises out of" the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. *Pigg v. Auto Shack*, 27 Ark. App. 42, 766 S.W.2d 36 (1989).

An employee was entitled to benefits for injuries sustained in an incident in which

another employee pulled a chair out from under her while she was changing from work clothes into street clothes as the injured employee was not an "active participant" in the assault that caused her injury. *Flowers v. Arkansas Hwy. & Transp. Dep't*, 62 Ark. App. 108, 968 S.W.2d 660 (1998).

—Burden of Proof.

Under subdivision (5)(E)(ii), only when the injury was not occasioned by a specific incident does it need to be shown that the compensable injury was the major cause of employee's disability. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

Only when a claimant who has sustained a compensable injury is seeking permanent disability benefits is there a requirement to prove that the compensable injury is the major cause of the permanent disability. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

The Workers' Compensation Commission erred as a matter of law when it required a finding that the claimant's work, rather than her injury, was the major cause of her disability or need for treatment. *Medlin v. Wal-Mart Stores, Inc.*, 64 Ark. App. 17, 977 S.W.2d 239 (1998).

Based on the Workers' Compensation Commission's credibility determination concerning the employee's testimony, the letter indicating that the employee had previously made complaints regarding neck pain, and the MRI proving that the employee had in fact sustained an injury to her cervical spine, the Commission had correctly found that the employee had met her burden of proving by a preponderance of the evidence that she sustained a compensable neck injury in addition to her low-back injury. *Searcy Indus. Laundry, Inc. v. Ferren*, 82 Ark. App. 69, 110 S.W.3d 306 (2003).

Where a hospital drug test was ruled invalid, employee was not required to show by a preponderance of the evidence that the cannabinoids and metabolites found in the test did not substantially occasion a burn suffered in a work-related accident. *Epoxy Prods. v. Padgett*, 84 Ark. App. 147, 138 S.W.3d 118 (2003).

Where there was evidence that employee drove a forklift without permission

very fast in tight circles like a game, and that employee was "wasting time and playing" while doing so, the Workers' Compensation Commission did not err in finding that the employee's injury was the result of horseplay under subdivision (4)(B)(i). *Morales v. Martinez*, 88 Ark. App. 274, 198 S.W.3d 134 (2004).

—Carpal Tunnel Syndrome.

Claimant was not required to prove that his carpal tunnel syndrome was the result of the same movement again and again; this interpretation of subdivision (5)(A)(ii)(a) is too restrictive and precludes multiple tasks, such as hammering or grinding, from being considered together to satisfy this section's requirements. *Baysinger v. Air Sys.*, 55 Ark. App. 174, 934 S.W.2d 230 (1996).

Carpal tunnel syndrome claimants must prove rapid repetitive motion to sustain a claim for a compensable injury; carpal tunnel syndrome is not exempted from the proof requirement of other gradual-onset injuries, but is merely listed as an example of a type of gradual-onset injury that may be proven by evidence of rapid repetitive motion. *Kildow v. Baldwin Piano & Organ*, 58 Ark. App. 194, 948 S.W.2d 100 (1997), rev'd, 333 Ark. 335, 969 S.W.2d 190 (1998).

Employee's carpal tunnel syndrome was compensable where a physician diagnosed carpal tunnel syndrome, a nerve conduction study confirmed the diagnosis, and medical records established the need for medical treatment. *Tyson Foods, Inc. v. Griffin*, 61 Ark. App. 222, 966 S.W.2d 914 (1998).

Carpal tunnel syndrome is both compensable and falls within the definition of rapid repetitive motion and, therefore, proof of rapid and repetitive motion by a claimant is not required. *Kildow v. Baldwin Piano & Organ*, 333 Ark. 335, 969 S.W.2d 190 (1998).

The claimant was entitled to benefits based on his carpal tunnel syndrome where it was undisputed that the claimant's employment required quick hand and wrist movements throughout the day, there was no doubt that his job was repetitive, and there was no other suggestion in the record as to what, other than his employment, could have caused his carpal tunnel syndrome. *Crudup v. Regal Ware, Inc.*, 69 Ark. App. 206, 11 S.W.3d 567

(2000), rev'd, 341 Ark. 804, 20 S.W.3d 900 (2000).

—Causal Connection.

Liability under former Workers' Compensation Act was based, not upon any act or omission of the employer but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured; it is enough if there be a causal connection between the injury and the employment substantially contributory though not the sole or proximate cause. *McGregor & Pickett v. Arrington*, 206 Ark. 921, 175 S.W.2d 210 (1943) (decision under prior law).

Causal connection established between injury and employment. *Pekin Wood Prods. Co. v. Graham*, 207 Ark. 564, 181 S.W.2d 811 (1944) (decision under prior law); *Crossett Chem. Co. v. Sedberry*, 232 Ark. 608, 339 S.W.2d 426 (1960); *International Paper Co. v. Myers*, 233 Ark. 378, 345 S.W.2d 1 (1961); *McGeorge Constr. Co. v. Taylor*, 234 Ark. 1, 350 S.W.2d 313 (1961); *Arkansas-Best Freight System v. Shinn*, 235 Ark. 314, 357 S.W.2d 661 (1962); *International Paper Co. v. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971); *Bechtel Corp. v. Winther*, 262 Ark. 361, 556 S.W.2d 882 (1977); *Benton Serv. Ctr. v. Pinegar*, 269 Ark. 768, 601 S.W.2d 227 (1980); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

A period of minutes between the discharge and injury of an employee on the work premises by another employee in a work connected fight does not bar the employee from receiving workers' compensation. *Johnson v. Safreed*, 224 Ark. 397, 273 S.W.2d 545 (1954).

The rule of liberal construction does not relieve the claimant of the burden of showing a causal relation between the injury and the employment. *McFall v. Farmers Tractor & Truck Co.*, 227 Ark. 985, 302 S.W.2d 801 (1957).

In order to show causal connection between deceased's work and his death it is not necessary that claimant show unusual physical exertion on the part of deceased prior to his death. *Harper v. Henry J. Kaiser Constr. Co.*, 233 Ark. 398, 344 S.W.2d 856 (1961).

The burden is on the claimant to show a causal connection between the death of deceased and his work. *Harper v. Henry J.*

Kaiser Constr. Co., 233 Ark. 398, 344 S.W.2d 856 (1961).

Causal connection not established between injury or death and employment. *Lemmer v. Chicopee Mfg. Co.*, 233 Ark. 523, 345 S.W.2d 629 (1961); *Latimer v. Sevier County Farmers' Coop.*, 233 Ark. 762, 346 S.W.2d 673 (1961); *Kivett v. Redmond Co.*, 234 Ark. 855, 355 S.W.2d 172 (1962); *Farrelly Lake Co. v. Redden*, 235 Ark. 404, 360 S.W.2d 187 (1962); *Pace Corp. v. Burns*, 251 Ark. 311, 472 S.W.2d 78 (1971); *Southland Corp. v. Hester*, 253 Ark. 959, 490 S.W.2d 132 (1973); *McCarty v. Reid*, 268 Ark. 756, 595 S.W.2d 702 (Ct. App. 1980); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

In determining the allowability of employee's claim for compensation under this chapter it was error not to permit a doctor to answer a hypothetical question embracing all of the essential facts involving causal connection between the work and employee's injury. *Johnson v. Bear Brand Roofing, Inc.*, 233 Ark. 639, 346 S.W.2d 472 (1961).

If the disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the commission's conclusions are controlling. *Hall v. Pittman Constr. Co.*, 235 Ark. 104, 357 S.W.2d 263 (1962).

Liberality in the application of this chapter does not extend to allowance of claims absent proof of one of the essential elements; causation is one of the essential elements. *Lybrand v. Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979).

It is not essential that the causal relationship between the accident and disability be established by medical evidence. *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

In order for a worker's disability to be compensable, there must be a causal connection between the accident and a risk which is reasonably incident to the employment. There must be affirmative proof of a distinctive employment risk as the cause of the injury; the connection with the employment cannot be supplied by speculation. *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

Where conversion disorder follows a physical, on-the-job injury, causal requirement is met if it is shown that symptoms of neurosis were triggered or precipitated by physical injury. *Boyd v. General Indus.*, 22 Ark. App. 103, 733 S.W.2d 750 (1987).

Compensable injury did not aggravate claimant's preexisting left hip condition and was not the major cause of the resulting left hip condition of claimant. *Langley v. Danco Constr. Co.*, 57 Ark. App. 295, 944 S.W.2d 142 (1997).

Compensable injury held not to be "major cause" of disability of claimant with cervical spondylosis. *Sullivan v. Paris Retirement Inn*, 60 Ark. App. 283, 961 S.W.2d 785 (1998).

A causal connection existed between the claimant's lifting at work and the findings at surgery where it was undisputed that the claimant had degenerative back disease, but his accidental injury at work either caused or precipitated the need for medication and surgery. *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000).

In order to prove a compensable injury, an appellee had to prove, among other things, a casual relationship between the injury and the employment; it was not essential that the casual relationship between the accident and the disability be established by medical evidence. *Wal-Mart Stores, Inc. v. Stotts*, 74 Ark. App. 428, 58 S.W.3d 853 (2001).

Objective medical evidence was necessary to establish the existence and extent of an injury but not essential to establish the casual relationship between the injury and work-related accident. *Wal-Mart Stores, Inc. v. Stotts*, 74 Ark. App. 428, 58 S.W.3d 853 (2001).

Where an employee acquired a serious infection through scratches obtained during the course of employment, the Workers' Compensation Commission erred by requiring the employee to prove that the infection was an occupational disease; the employee was only required to establish a causal link between the scratches and the infection in order to show a compensable accident injury under subdivision (4)(a). *Heptinstall v. Asplundh Tree Expert Co.*, 84 Ark. App. 215, 137 S.W.3d 421 (2003).

Workers' compensation commission did not err in finding that claimant failed to prove by a preponderance of the evidence that his cognitive dysfunction and psycho-

logical problems were causally related to his having being accidentally shocked with 440 volts of electricity. *Arbaugh v. A.G. Processing, Inc.*, 360 Ark. 491, 202 S.W.3d 519 (2005).

Where employee returned to work after an accident and an MRI taken months later showed a broad posterior disc protrusion at C6-7, which the doctor stated was causally related to the accident, the Arkansas Workers' Compensation Commission erred by finding that the employee did not sustain a compensable injury. *Wilson v. Cornerstone Masonry*, 95 Ark. App. 1, 233 S.W.3d 161 (2006).

—Disease.

Employee was entitled to an award for disability caused by an occupational disease or infection arising out of his employment. *Solid Steel Scissors Co. v. Kennedy*, 205 Ark. 958, 171 S.W.2d 929 (1943); *Pekin Wood Prods. Co. v. Graham*, 207 Ark. 564, 181 S.W.2d 811 (1944) (preceding cases decided under prior law); *Shell Oil Co. v. Miller*, 220 Ark. 546, 248 S.W.2d 698 (1952); *Faust Band Saw Mill v. Richardson*, 221 Ark. 336, 253 S.W.2d 213 (1952); *Arkansas Power & Light Co. v. Scroggins*, 230 Ark. 936, 328 S.W.2d 97 (1959); *Chambers v. Bigelow-Liptak Corp.*, 233 Ark. 330, 344 S.W.2d 588 (1961); *Donaldson v. Socia*, 254 Ark. 158, 492 S.W.2d 253 (1973); *Dega Poultry Co. v. Tanner*, 259 Ark. 396, 533 S.W.2d 207 (1976).

An attack of angina pectoris which results in disability as defined in this section may constitute an injury giving rise to compensation if it arises out of and occurs in the course of employment. *Nashville Livestock Comm'n v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990).

—Evidence.

Employee will not be denied recovery for injury caused by his work merely because he cannot point out any particular activity that caused him pain or increased pain or mention any incident when an activity produced an unusual or increased pain. *Shainberg v. Dacus*, 233 Ark. 622, 346 S.W.2d 462 (1961).

Expert medical testimony was not essential proof where evidence warranted finding of injury as to worker pinned between two machines. *Harris Cattle Co. v. Parker*, 256 Ark. 166, 506 S.W.2d 118 (1974); *Burks v. Anthony Timberlands,*

Inc., 21 Ark. App. 1, 727 S.W.2d 388 (1987).

Evidence was insufficient to support commission's finding that there was no causal relationship between the disability and the on-the-job injury. *Boyd v. General Indus.*, 22 Ark. App. 103, 733 S.W.2d 750 (1987).

Evidence sufficient to support finding of an independent intervening cause. *Appleby v. Belden Corp.*, 22 Ark. App. 243, 738 S.W.2d 807 (1987).

Evidence that employee sustained a compensable back injury due to a slip-and-fall at the hotel where he worked, held insufficient. *Kuhn v. Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996).

Claim for benefits for a back injury denied where claimant failed to show the injury was work-related and failed to support his claim with objective medical evidence. *Crawford v. Pace Indus.*, 55 Ark. App. 60, 929 S.W.2d 727 (1996).

Denial of benefits held improper where the medical evidence of the claimant's back injury was uncontroverted, the claimant gave adequate account of the injury, and the Commission gave inconsistent findings of fact. *Jordan v. J.C. Penney Co.*, 57 Ark. App. 174, 944 S.W.2d 547 (1997).

The requirement that a compensable injury must be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

The inconsistencies between claimant's testimony and the medical evidence persuaded the Commission that claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of and during the course of his employment. *McMillan v. U.S. Motors*, 59 Ark. App. 85, 953 S.W.2d 907 (1997).

Pregnant employee who suffered a back injury held to have a compensable injury supported by objective findings, even though certain diagnostic X-rays could not be performed due to her pregnancy. *University of Ark. Medical Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997).

Physician's determination of impairment was not upheld where only range-of-motion tests were performed. *Department of Parks & Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998).

Evidence of six-week healing period held sufficient where there was evidence that employee suffered from overuse syndrome affecting her left hand, and the condition improved after she stopped using her hand altogether for six weeks on the recommendation of her specialist. *American Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998).

Injured worker failed to establish a compensable injury where he did not report an injury either to his foreman or to his physicians and he waited about 4 weeks to file a claim. *Barnett v. Natural Gas Pipeline Co.*, 62 Ark. App. 265, 970 S.W.2d 319 (1998).

Evidence held insufficient to establish compensable injury. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

There were no objective findings in the record to support a diagnosis of de Quervain's tenosynovitis as required by subdivision (5)(A)(ii)(a) of this section and, therefore, the claimant was not entitled to benefits for this diagnosis. *Stevenson v. Frolic Footwear*, 70 Ark. App. 383, 20 S.W.3d 413 (2000).

Workers' Compensation Commission did not err in its determination that the employee's range of motion tests did not constitute objective findings to support an award of benefits where the tests were under the employee's voluntary control. *Mays v. Alumnitec, Inc.*, 76 Ark. App. 274, 64 S.W.3d 772 (2001).

Where it was established that: 1) the medical report prepared by the emergency room physician shortly after the accident specifically noted that the employee did not strike her head; 2) an authorized physician testified that it was more common to have a concussion in conjunction with a blow to the head and that a concussion would not likely occur in a slip-and-fall accident; and 3) the objective CT scan of employee's brain did not indicate an abnormality, substantial evidence existed to support the Workers' Compensation Commission's finding that the employee failed to establish evidence of a concussion or other brain injury. *Sharp v. Lewis Ford, Inc.*, 78 Ark. App. 164, 78 S.W.3d 746 (2002).

Workers' Compensation Commission's decision affirming the administrative law judge's finding that an employee was entitled to permanent anatomical impair-

ment was reversed and remanded where the commission failed to make the specific findings of fact necessary for the reviewing court to carry out a meaningful review of issues relating to whether the employee's injury was the major cause of his impairment, the permanency of the employee's condition, the assessment of the medical evidence, and the employee's impairment rating. *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

Workers' Compensation Commission did not err in affirming an administrative law judge's decision that claimant failed to prove by a preponderance of the evidence that his claimed cognitive dysfunction and psychological problems were causally related to a 440-volt electrical shock he suffered in an accident at work. *Arbaugh v. AG Processing, Inc.*, 86 Ark. App. 303, 184 S.W.3d 53 (2004), *aff'd*, 360 Ark. 491, 202 S.W.3d 519 (2005).

Substantial evidence supported Workers' Compensation Commission's finding that claimant acted diligently in obtaining the additional medical evidence and that claimant sustained a compensable injury; the December 2001 MRI report and the February 2002 operative report, both introduced at the second hearing, constituted sufficient evidence to uphold the findings. *Hargis Transp. v. Chesser*, 87 Ark. App. 301, 190 S.W.3d 309 (2004).

Although employer argued that the only evidence of employee having muscle spasms was her self-serving testimony and the subjective history that she gave to an emergency room nurse five months after her alleged incident, it was undisputed that, at the time of the accident, the employee was diagnosed as having suffered thoracic and lumbar contusion and strain and that the company physician prescribed a medication for the relief of muscle spasms and other musculoskeletal conditions; thus, employer's argument that there was no medical evidence supporting objective findings of an injury was rejected and employee was entitled to temporary total disability benefits. *Fred's, Inc. v. Jefferson*, 89 Ark. App. 95, 200 S.W.3d 477 (2004), *aff'd*, 361 Ark. 258, 206 S.W.3d 238 (2005).

Employer's appeal of a worker's compensation award was affirmed as there was substantial evidence to support the Commission's finding that (1) the worker

suffered a compensable injury under subdivision (4)(D) of this section, (2) it was not a recurrence of his prior back injuries, and (3) the Shippers defense was inapplicable. *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, 212 S.W.3d 25 (2005).

Claimant was unable to prove the existence of a new injury as the objective medical findings were unchanged from claimant's prior work-related injury; thus, the denial of benefits for his low-back injury was proper. *Liaromatis v. Baxter County Reg'l Hosp.*, 95 Ark. App. 296, 236 S.W.3d 524 (2006).

Award of benefits to employee for a repetitive injury was reversed as, while the evidence established that employee had engaged in repetitive motion, there was no evidence that the injury was the result of a rapid motion. *Holland Group, Inc. v. Hughes*, 95 Ark. App. 369, 237 S.W.3d 120 (2006).

Arkansas Workers' Compensation Commission erred in rejecting subjective evidence in determining that employee sustained no anatomical impairment as a result of his ankle injury as the injury was supported by objective findings which could not come under the employee's voluntary control. *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W.3d 709 (2006).

—Hemorrhoids.

Hemorrhoids are not a compensable injury as defined by subdivision (5)(A)(ii) of this section. *Tillman v. Baldwin & Shell Constr.*, 58 Ark. App. 177, 948 S.W.2d 118 (1997).

—Idiopathic Injuries.

Idiopathic injury is one whose cause is personal in nature, or peculiar to the individual; injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. *Crawford v. Single Source Transp.*, 87 Ark. App. 216, 189 S.W.3d 507 (2004).

Because an idiopathic injury is not related to employment, it is generally not compensable unless conditions related to the employment contribute to the risk by placing the employee in a position, which increases the dangerous effect of the fall. *Crawford v. Single Source Transp.*, 87 Ark. App. 216, 189 S.W.3d 507 (2004).

Substantial evidence did not exist to support the finding that employee's injury

was idiopathic and noncompensable because there was no evidence presented that employee's broken foot was caused by his diabetes. *Swaim v. Wal-Mart Assocs.*, 91 Ark. App. 120, 208 S.W.3d 837 (2005).

—Injury Off Premises.

Injuries or death occurring off of employer's premises held to be compensable. *Hunter v. Summerville*, 205 Ark. 463, 169 S.W.2d 579 (1943); *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S.W.2d 573 (1947) (preceding cases decided under prior law); *Owens v. Southeast Ark. Transp. Co.*, 216 Ark. 950, 228 S.W.2d 646 (1950); *American Cas. Co. v. Jones*, 224 Ark. 731, 276 S.W.2d 41 (1955); *Frank Lyon Co. v. Oats*, 225 Ark. 682, 284 S.W.2d 637 (Ark. 1955); *Arkansas Power & Light Co. v. Cox*, 229 Ark. 20, 313 S.W.2d 91 (1958); *Fine Nest Trailer Colony, Inc. v. Reep*, 235 Ark. 411, 360 S.W.2d 189 (1962); *Bechtel Corp. v. Winther*, 262 Ark. 361, 556 S.W.2d 882 (1977); *Bunny Bread v. Shipman*, 267 Ark. 926, 591 S.W.2d 692 (Ct. App. 1979); *City of Sherwood v. Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982); *Daniels v. Commercial Union Ins. Co.*, 5 Ark. App. 142, 633 S.W.2d 396 (1982); *University of Ark. Medical Sciences Ctr. v. Raleigh*, 14 Ark. App. 277, 688 S.W.2d 303 (1985); *Fisher v. Proksch*, 20 Ark. App. 80, 723 S.W.2d 852 (1987).

Injury or death occurring off of employer's premises held not to be compensable. *Fox Bros. Hdwe. Co. v. Wilson*, 206 Ark. 680, 177 S.W.2d 44 (1944); *Stroud v. Gurdon Lumber Co.*, 206 Ark. 490, 177 S.W.2d 181 (1944) (preceding cases decided under prior law); *Penny v. Hudson Dairy*, 218 Ark. 594, 237 S.W.2d 893 (1951); *Pearson v. Faulkner Radio Serv. Co.*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Martin v. Laverder Radio & Supply, Inc.*, 228 Ark. 85, 305 S.W.2d 845 (1957); *Johnson v. Clark*, 230 Ark. 275, 322 S.W.2d 72 (1959); *Beckerman v. Owosso Mfg. Co.*, 233 Ark. 973, 350 S.W.2d 321 (1961); *McCollum v. Rogers*, 238 Ark. 499, 382 S.W.2d 892 (1964); *Brooks v. Wage*, 242 Ark. 486, 414 S.W.2d 100 (1967); *Carter v. Ward Body Works, Inc.*, 246 Ark. 515, 439 S.W.2d 286 (1969); *Wilson v. UAW Int'l Union*, 246 Ark. 1158, 441 S.W.2d 475 (1969); *Willis v. Dumas*, 250 Ark. 496, 466 S.W.2d 268 (1971); *Chicot Mem. Hosp. v. Veazey*, 9 Ark. App. 18, 652 S.W.2d 631 (1983); *Howard v. Arkansas Power & Light Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987).

The general rule is that injuries sustained by employees going to and from their regular place of employment are not deemed to arise out of or in the course of their employment. *Blankinship Logging Co. v. Brown*, 212 Ark. 871, 212 Ark. 948, 208 S.W.2d 778 (1948) (decision under prior law) *Fisher v. Proksch*, 20 Ark. App. 80, 723 S.W.2d 852 (1987); *Howard v. Arkansas Power & Light Co.*, 20 Ark. App. 98, 724 S.W.2d 193 (1987); *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995).

When a vehicle is supplied by the employer for mutual benefit of himself and the worker to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor. *Blankinship Logging Co. v. Brown*, 212 Ark. 871, 212 Ark. 948, 208 S.W.2d 778 (1948) (decision under prior law).

Whether an employee is acting in the course of his employment in going to or from the place of his employment will depend largely upon the particular facts and circumstances of each case under this chapter. *Owens v. Southeast Ark. Transp. Co.*, 216 Ark. 950, 228 S.W.2d 646 (1950).

The course of employment of a traveling salesman covers the time and place of traveling as well as the selling of goods. *Frank Lyon Co. v. Oats*, 225 Ark. 682, 284 S.W.2d 637 (Ark. 1955).

Where the trip or attendance of a traveling salesman is one ordered or directed by the employer or is for the mutual benefit of employer and employee, compensation may be recovered for injury during the trip. *Frank Lyon Co. v. Oats*, 225 Ark. 682, 284 S.W.2d 637 (Ark. 1955).

Exceptions to the general rule that an employee is not in the course of his employment while going to or returning from his home in which off-premises injuries are held compensable, involved situation (1) where the employee is subject to call at all hours, and (2) when the employee has a duty to perform for the employer while en route home. *Arkansas Power & Light Co. v. Cox*, 229 Ark. 20, 313 S.W.2d 91 (1958).

Question as to whether or not injury of employee who has left employer's premises is compensable was not how near he may have been to his employer's premises when he was injured but whether he was performing any duty in connection with his employment or was at the point of the

accident at his employer's direction, or was using facilities supplied by the employer. *Beckerman v. Owosso Mfg. Co.*, 233 Ark. 973, 350 S.W.2d 321 (1961).

The street adjacent to employer's plant could not be considered as part of employer's premises for workers' compensation purposes even though the street at the point of the plant was heavily used by employer. *Beckerman v. Owosso Mfg. Co.*, 233 Ark. 973, 350 S.W.2d 321 (1961).

The criteria for applying the special hazard exception to the going and coming rule is not sheer distance or proximity but rather the causal connection between the injury and the employment, nor is the exception necessarily inapplicable due to the existence of an alternate route. *Bechtel Corp. v. Winther*, 262 Ark. 361, 556 S.W.2d 882 (1977).

In order for an injury incurred while the employee is going to work to be compensable, the employee must fall within one of the exceptions to the going and coming rule such as where an employee is injured while in close proximity to the employer's premises, where the employer furnishes the transportation to or from work, where the employee is a traveling salesman, where the employee is injured on a special mission or errand, or when the employer compensates the employee for his time from the moment he leaves home until he returns home. *City of Sherwood v. Lowe*, 4 Ark. App. 161, 628 S.W.2d 610 (1982).

An injury sustained by a worker riding in a private automobile while going home from work is not a compensable one where the employer pays an insubstantial portion of the travel expense. *Chicot Mem. Hosp. v. Veazey*, 9 Ark. App. 18, 652 S.W.2d 631 (1983).

Injury during a trip which serves both a business and a personal purpose is within the course of employment if the work of the employee creates the necessity for travel; if, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk. *Rankin v. Rankin Constr. Co.*, 12 Ark. App. 1, 669 S.W.2d 911 (1984); *Fisher v. Proksch*, 20 Ark. App. 80, 723 S.W.2d 852 (1987).

Employee was in the course of his employment when he turned from his route to the restaurant where he was employed to go to the catering kitchen to pick up the equipment he had been directed to return to the restaurant, as it is clear that someone would have had to get this equipment and take it to the restaurant and once the employee turned toward the catering kitchen for that purpose, he was, at least, on a "dual-purpose" journey and therefore in the course of his employment. *Jane Traylor, Inc. v. Cooksey*, 31 Ark. App. 245, 792 S.W.2d 351 (1990).

The risk of injury during the course of a trip by the claimant to retrieve forgotten medication needed for a compensable first injury is one which, on balance, ought not to be borne by the employer, thus, the second injury sustained during such a trip is not compensable. *Wolfe v. City of El Dorado*, 33 Ark. App. 25, 799 S.W.2d 812 (1990).

A determination that a trip falls within the "dual purpose" exception to the going and coming rule does not end the inquiry; instead, the dual purpose doctrine merely serves to label the overall trip as either business or personal: deviations from the main purpose require a separate inquiry. *Day v. Central Day Care, Inc.*, 38 Ark. App. 241, 833 S.W.2d 783 (1992).

Where claimant had completed her employer's errand and was returning to work in her vehicle, the commission could properly find that slipping on ice while pursuing a personal errand was a risk of the deviation, rather than of the employment. *Day v. Central Day Care, Inc.*, 38 Ark. App. 241, 833 S.W.2d 783 (1992).

Some nexus between the employment and travel must be present in order for a claimant to recover for injuries sustained on a trip from his employer's premises to his home. *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995).

Although claimant was not directly compensated for her travel time, because traveling was an inherent and necessary incident of the claimant's required employment activity, the claimant was "performing employment services" under subdivision (5)(B)(iii) when she was injured while en route from her employer's office to a client's home. *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934

S.W.2d 956 (1996), *aff'd*, 328 Ark. 381, 944 S.W.2d 524 (1997).

The premises exception to the going-and-coming rule has effectively been eliminated by subdivision (5)(B)(iii). *Hightower v. Newark Pub. Sch. Sys.*, 57 Ark. App. 159, 943 S.W.2d 608 (1997).

—Independent Intervening Cause.

If there is a causal connection between a primary compensable injury and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity of the claimant that is "unreasonable under the circumstances." *Davis v. Old Dominion Freight Line*, 341 Ark. 751, 20 S.W.3d 326 (2000).

—Intoxicants.

Where claimant's laboratory test results showed high levels of cannabinoids in his urine on the day he was injured, under subdivision (5)(B)(iv), this created a rebuttable presumption that his injury was substantially occasioned by the use of illegal drugs. *Weaver v. Whitaker Furn. Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996).

There was no presumption under subdivision (5)(B)(iv) that the injury was substantially occasioned by the alcohol or drugs where the urine specimen was not collected until two days after the injury and the employee has a credible explanation for the presence of codeine in the urine. *Morrilton Manor v. Brimmage*, 58 Ark. App. 252, 952 S.W.2d 170 (1997).

Urine test showing presence of marijuana metabolites was sufficient evidence to invoke the presumption that employee's accident was substantially occasioned by the use of marijuana. *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998), review denied, 334 Ark. 35, 970 S.W.2d 807 (1998); *Graham v. Turnage Emp. Group*, 60 Ark. App. 150, 960 S.W.2d 453 (1998), review denied, 334 Ark. 32, 970 S.W.2d 808 (Ark. 1998).

This section does not require that the Commission promulgate drug-testing procedures or specify particular types of tests to be used as a precondition to the intoxication presumption in subdivision (5)(B)(iv); the Arkansas General Assembly could have required testing that would show a certain level of illegal drugs, as it has required to invoke the presumption in

D.W.I. cases, but it has not made such a requirement. *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998), review denied, 334 Ark. 35, 970 S.W.2d 807 (1998); *Graham v. Turnage Emp. Group*, 60 Ark. App. 150, 960 S.W.2d 453 (1998), review denied, 334 Ark. 32, 970 S.W.2d 808 (Ark. 1998); *Rudick v. Unifirst Corp.*, 60 Ark. App. 173, 962 S.W.2d 819 (1998).

A blood-alcohol level of less than 0.01% was low enough to rebut the presumption that employee's injury was substantially occasioned by alcohol. *ERC Contractor Yard & Sales v. Robertson*, 60 Ark. App. 310, 961 S.W.2d 36 (1998), *aff'd*, 335 Ark. 63, 977 S.W.2d 212 (Ark. 1998).

Employee's long term use of alcohol did not disqualify him from receiving workers' compensation disability benefits where he had not consumed alcohol on the date of the injury, even though he was injured as a result of a fall caused by an alcohol-withdrawal seizure. *ERC Contractor Yard & Sales v. Robertson*, 60 Ark. App. 310, 961 S.W.2d 36 (1998), *aff'd*, 335 Ark. 63, 977 S.W.2d 212 (Ark. 1998).

A worker failed to rebut the presumption that his motor vehicle accident was caused by the use of illegal drugs where he tested positive for opiates and cocaine metabolites and the only evidence presented to rebut the presumption was his own uncorroborated testimony concerning the nature and extent of his drug use and his own uncorroborated testimony regarding his interpretation of the cause of his accident. *Ester v. National Home Ctrs., Inc.*, 61 Ark. App. 91, 967 S.W.2d 565 (1998).

An employee rebutted the presumption that a motor vehicle accident in which he was involved was substantially occasioned by the use of alcohol, notwithstanding that he was found to have a blood alcohol level of .021 percent, where he was driving between 6:00 and 7:00 PM. on a two-lane road under the posted speed limit, it was raining and foggy, his trailer was empty, he was cut off by another vehicle, he passed a field sobriety test administered by the investigating officer, and he was not cited for being under the influence of alcohol. *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 811 (1998).

An employee who tested positive for marijuana metabolites 2 days after an

accident in which he fell through a hole cut in the roof of a new building while carrying a 4 foot by 16 foot board with his supervisor rebutted the statutory presumption that his injury was substantially occasioned by the use of marijuana where he testified that he had not smoked marijuana on the day of the accident or in the preceding few days, the manner in which he carried the board prevented him from seeing the hole, and he was fatigued because he had worked 7 days in a row and was in his 28th hour of overtime. *Express Human Resources v. Terry*, 61 Ark. App. 258, 968 S.W.2d 630 (1998).

A blood test which showed a blood alcohol level of less than .01 percent was sufficient to trigger the statutory presumption that an injury was substantially occasioned by the use of alcohol. *ERC Contr. Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (Ark. 1998).

The phrase "substantially occasioned by the use of alcohol" requires that there be a direct causal link between the injury and the use of alcohol, rather than the abstinence from the use of alcohol, and, therefore, the fact that the claimant's accident was caused by an alcohol-withdrawal seizure did not allow a finding that the accident was substantially related to the use of alcohol. *ERC Contr. Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (Ark. 1998).

Evidence held sufficient to rebut the statutory presumption that the claimant's injury was substantially occasioned by the use of alcohol where (1) the claimant's supervisor testified that the claimant did not use alcohol on the day of his accident, (2) the medical reports reflected that the claimant told his doctors that he did not use alcohol on the day of the accident, (3) the claimant's girlfriend told his doctors that the claimant did not use alcohol on the day of the accident, and (4) the claimant's doctors concurred that a seizure related to alcohol-withdrawal syndrome caused the claimant's accident. *ERC Contr. Yard & Sales v. Robertson*, 335 Ark. 63, 977 S.W.2d 212 (Ark. 1998).

The presence of alcohol in an employee's body was not proven simply by testimony that his breath smelled of alcohol, since the evidence presented did not negate the reasonable hypothesis that such smell might have come from his previous night's drinking, especially in light of his testi-

mony that he drank several beers the night before his accident, that he slept in his clothes and wore the clothes to work the next morning, and that he did not brush his teeth prior to departing for work. *Flowers v. Norman Oaks Constr. Co.*, 68 Ark. App. 239, 6 S.W.3d 118 (1999), rev'd, 341 Ark. 474, 17 S.W.3d 472 (2000).

In a proceeding pertaining to the electrocution of a tree service employee which occurred when he was struck in the face by an energized wire which fell from a tree branch he picked up, the Workers' Compensation Commission properly found that the presence of marijuana metabolites in the employee's system constituted the presence of an illegal drug and therefore invoked the rebuttable presumption found in subsection (5)(B)(iv)(b) of this section that his death was substantially occasioned by the use of marijuana. *Wood v. West Tree Serv.*, 70 Ark. App. 29, 14 S.W.3d 883 (2000).

A finding of the presence of alcohol in the claimant's body was supported by substantial evidence, notwithstanding the absence of medical testing, where (1) the claimant admitted that he drank 6 to 8 beers the night before the accident, and stated that he went to bed by 11:00 or 11:30 p.m. the night before the accident and left for work on the morning of the accident at about 6:30 a.m., (2) upon arrival at the accident scene, paramedics noted a strong smell of alcohol about the claimant at 8:45 a.m., (3) the registered nurse at the hospital reported that the claimant had a smell of alcohol about his breath, (4) when the claimant was readmitted to the hospital a week later complaining of hallucinations, his medical records stated that he admitted that he habitually drank a twelve-pack or six-pack of beer a day, and (5) there was circumstantial evidence that the claimant drank at the job site. *Flowers v. Norman Oaks Constr. Co.*, 341 Ark. 474, 17 S.W.3d 472 (2000).

Substantial evidence existed for the Worker's Compensation Commission to deny relief to the claimant where he both readily admitted smoking crack cocaine the night before he fell from rickety scaffolding and admitted that he tested positive for a drug screen on the date of the accident. *Woodall v. Hunnicutt Constr.*, 340 Ark. 377, 12 S.W.3d 630 (2000).

The presence of alcohol in an employee's body need not be proven by medical testing but can also be proven by testimony that a claimant was seen consuming alcohol prior to his accident, had slurred speech, and was unsteady on his feet. *Flowers v. Norman Oaks Constr. Co.*, 68 Ark. App. 239, 6 S.W.3d 118 (1999), rev'd, 341 Ark. 474, 17 S.W.3d 472 (2000).

Evidence was sufficient to rebut the presumption that the claimant's injury was caused by her use of intoxicants where (1) the claimant's hand was caught in a press she was operating, (2) a drug test two days later found codeine and methamphetamine in her system, and (3) the plant supervisor testified that within a 24 hour period another person was injured while running the same machine, that he personally checked the safety devices on the machine on the date of the accident, and that since the accident the company had put a double hand control button on the press, and (4) the safety supervisor testified that the accident was caused by a "pinch point" and that it was corrected with a double hand-actuating device. *Bice v. Waterloo Indus., Inc.*, 71 Ark. App. 1, 26 S.W.3d 129 (2000).

Claimant was awarded workers' compensation benefits where the Workers' Compensation Commission held that the claimant had rebutted the presumption contained in subdivision (4)(B)(iv)(b) and proved by a preponderance of the evidence that the accident in which he was injured was not "substantially occasioned" by the use of illegal drugs. *Sys. Contr. Corp. v. Reeves*, 85 Ark. App. 286, 151 S.W.3d 18 (2004).

Workers' Compensation Commission did not err in failing to find any indication that, on the date of a fatal injury, illegal drugs had caused the accident where none of claimant's co-workers saw him use drugs or otherwise exhibit signs of impairment and not one of the expert toxicologists could state when claimant had ingested the drugs. *Ark. Elec. Coop. v. Ramsey*, 87 Ark. App. 254, 190 S.W.3d 287 (2004).

Degloving injury to the genitalia and scrotum was not substantially occasioned by the use of drugs under subdivision (4)(B)(iv)(a) of this section; even though a positive drug test gave rise to a presumption, that was rebutted by the testimony of co-workers that the employee did not

appear to be under the influence at any time. *Ward v. Hickory Springs Mfg. Co.*, 97 Ark. App. 311, 248 S.W.3d 482 (2007).

—Medical Expenses.

Although claimant failed to prove a compensable injury, the employer was responsible for those medical expenses which were incurred by the claimant at the employer's direction. *Southern Hospitalities v. Britain*, 54 Ark. App. 318, 925 S.W.2d 810 (1996).

—Mental Injury.

This section and § 11-9-113(a)(1) set out a requirement that a physical injury precede and cause the mental injury in order for the mental injury to be compensable under this chapter. *Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997).

—Preexisting Infirmary.

Work-related activity aggravated preexisting injury which resulted in compensable injury. *McGregor & Pickett v. Arrington*, 206 Ark. 921, 175 S.W.2d 210 (1943) (decision under prior law); *Triebisch v. Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951); *W. Shanhouse & Sons v. Sims*, 224 Ark. 86, 272 S.W.2d 68 (1954); *Magnet Cove Barium Corp. v. Evans*, 226 Ark. 524, 291 S.W.2d 237 (1956); *Bryant Stave & Heading Co. v. White*, 227 Ark. 147, 296 S.W.2d 436 (1956); *Safeway Stores, Inc. v. Harrison*, 231 Ark. 10, 328 S.W.2d 131 (1959); *Reynolds Metals Co. v. Robbins*, 231 Ark. 158, 328 S.W.2d 489 (1959); *Allen v. Clark*, 233 Ark. 394, 345 S.W.2d 371 (1961); *McGeorge Constr. Co. v. Taylor*, 234 Ark. 1, 350 S.W.2d 313 (1961); *Massey Ferguson, Inc. v. Flenoy*, 270 Ark. 126, 603 S.W.2d 463 (1980).

An employee who collapses under an excessive work load is entitled to workers' compensation as suffering an accidental injury arising out of the employment, even though he had a preexisting weakness, known to him and his employer, which contributed to the collapse. *Tri-States Constr. Co. v. Worthen*, 224 Ark. 418, 274 S.W.2d 352 (1955).

An injury which brings about an aggravation of a preexisting condition is compensable under this chapter. *McGregor & Pickett v. Arrington*, 206 Ark. 921, 175 S.W.2d 210 (1943) (decision under prior law); *Hamilton v. Kelley-Nelson Constr.*

Co., 228 Ark. 612, 309 S.W.2d 323 (1958); *Safeway Stores, Inc. v. Harrison*, 231 Ark. 10, 328 S.W.2d 131 (1959); *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

Preexisting disease or injury held not aggravated by work-related activity. *Arkansas Power & Light Co. v. Scroggins*, 230 Ark. 936, 328 S.W.2d 97 (1959); *C.P. Chaney Sawmill, Inc. v. Robertson*, 233 Ark. 711, 348 S.W.2d 703 (1961); *Mounts v. Bechtel Corp.*, 256 Ark. 318, 507 S.W.2d 99 (1974); *Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996).

The performance of labor by an employee who dies soon afterwards because of a heart attack may be considered as an aggravation of a preexisting condition, and it makes no material difference whether the attack precedes the labor or the labor precedes the attack if the labor performed hastens the death. *Reynolds Metals Co. v. Robbins*, 231 Ark. 158, 328 S.W.2d 489 (1959).

Where employee suffers a heart attack and then performs some labor after which he collapses and dies, the fact that he was only engaged in his ordinary and normal duties at the time of his death does not bar recovery. *Reynolds Metals Co. v. Robbins*, 231 Ark. 158, 328 S.W.2d 489 (1959); *Rebsamen West, Inc. v. Bailey*, 239 Ark. 1100, 396 S.W.2d 822 (1965).

When industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable and no attempt is made to weigh the relative contribution of the accident and the preexisting condition to the final disability. *McDaniel v. Hilyard Drilling Co.*, 233 Ark. 142, 343 S.W.2d 416 (1961).

It is not necessary that an injury be caused by unusual strain or exertion before it is compensable, but rather, the claim is compensable when the claimant's ordinary work aggravates a preexisting condition, and thus contributes to the injury. *McGeorge Constr. Co. v. Taylor*, 234 Ark. 1, 350 S.W.2d 313 (1961).

While Arkansas Supreme Court has not held that "any" heart attack on the job is compensable, where there is medical testimony that the work aggravated or hastened the occlusion the finding of the commission awarding disability benefits will not be reversed. *Reynolds Metals Co.*

v. Cain, 243 Ark. 483, 420 S.W.2d 872 (1967).

Substantial evidence supported commission's finding of a separate and distinct injury rather than recurrence of former injury. *Curtis Mathes of Ark., Inc. v. Summerville*, 256 Ark. 340, 507 S.W.2d 108 (1974).

A preexisting disease or infirmity of an employee does not disqualify his claim under the requirement that the disability arise out of the employment where the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Little v. Delta Rice Mill, Inc.*, 11 Ark. App. 114, 667 S.W.2d 373 (1984).

When a preexisting injury is aggravated by a later compensable injury, compensation is in order. However, a claimant must prove that a compensable injury is the cause of any aggravation to a preexisting injury. *Wade v. Mr. C. Cavanaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988), superseded, 298 Ark. 363, 768 S.W.2d 521 (1989).

In workers' compensation law, the employer "takes the employee as he finds him" and employment circumstances that aggravate pre-existing conditions are compensable. *Public Employee Claims Div. v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992).

Where an employee's disability had been worsened by her diabetes and obesity, which in turn had been exacerbated by the failure to follow diets prescribed for her, there was no evidence to support the Workers' Compensation Commission's conclusions that the employee's disability would be less than total were it not for the flare up of her diabetic condition, and no substantial basis for the commission's conclusion that she failed to prove entitlement. *Weller v. Darling Store Fixtures*, 38 Ark. App. 95, 828 S.W.2d 858 (1992).

Evidence held sufficient to support termination that employee suffered a compensable injury when she dislocated her shoulder while reaching under a patient's bed, even though she had other episodes in her past when her shoulder popped out. *St. Vincent Infirmary Medical Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

An employee's second foot injury was a compensable consequence of his initial

work-related injury where the employee dropped a sledge hammer on his foot at work and sustained a nondisplaced fracture, he returned to work in a few days wearing protective boots, and, a few days later, stepped on or tripped over a tree root while in a park for a church function and sustained a displaced fracture of his foot. *Oak Grove Lumber Co. v. Highfill*, 62 Ark. App. 42, 968 S.W.2d 637 (1998).

Substantial evidence supported the termination that a claimant's back injury did not aggravate a preexisting condition (a "propensity to obesity"), and the claimant was not entitled to an evaluation for weight-loss surgery and additional temporary total disability benefits. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999).

Decision of the Arkansas Workers' Compensation Commission that an employee did not prove that he suffered a compensable back injury, because the injury was the result of a preexisting degenerative disk disease and prior back surgeries, was supported by substantial evidence, particularly in light of the evidence that he had suffered a previous back injury and had undergone two neck surgeries and four back surgeries. *Hickman v. Kellogg, Brown & Root*, 372 Ark. 501, 277 S.W.3d 591 (2008).

—Psychological Injury.

There is no reason why harm to the body of a worker should be limited to visible physical injury to the bones and muscles and should exclude work-related trauma which results in an injury to the mind; accordingly, psychological trauma injuries may be compensable under this chapter. *Owens v. National Health Labs., Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983).

Where the psychological injury, if any, resulted from nontraumatically induced events, the claimant must show more than the ordinary day-to-day stress to which all workers are subjected in order to recover compensation for his psychological injuries. *Owens v. National Health Labs., Inc.*, 8 Ark. App. 92, 648 S.W.2d 829 (1983); *Barrett v. Arkansas Rehabilitation Servs.*, 10 Ark. App. 102, 661 S.W.2d 439 (1983).

Whether stress is more than ordinary and the psychological injury is causally connected to it or aggravated by it are

questions of fact for the commission to determine. *Barrett v. Arkansas Rehabilitation Servs.*, 10 Ark. App. 102, 661 S.W.2d 439 (1983).

Commission finding that claimant's disability due to mental illness did not arise out of and in course of employment was supported by evidence. *Barrett v. Arkansas Rehabilitation Servs.*, 10 Ark. App. 102, 661 S.W.2d 439 (1983).

Conversion reaction is a compensable condition, and the court will award benefits for a psychological reaction to a compensable injury. *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992).

Where employee's current psychological problems bore a causal relationship to his work-related injury, decision of Worker's Compensation Board mandating temporary total disability benefits was affirmed. *CDI Contractors v. McHale*, 41 Ark. App. 57, 848 S.W.2d 941 (1993).

—Rapid Repetitive Motion.

Motions of delivery truck driver, who briefly performed several different rapid motions, repeated at differing intervals and separated by periods of several minutes, did not constitute rapid repetitive motion under the meaning of subdivision (5)(A)(ii)(a) of this section. *Lay v. UPS*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

Claimant's assembly line work of gripping, twisting, and squeezing wires to secure small components to boards all day long qualified as "rapid repetitive" in the ordinary and generally accepted meaning of the words. *Kildow v. Baldwin Piano & Organ*, 58 Ark. App. 194, 948 S.W.2d 100 (1997), rev'd, 333 Ark. 335, 969 S.W.2d 190 (1998).

In the most compelling case demonstrating rapid repetitive motion to date, rapid repetitive motion shown where employee's assembly duties required her to attach a nut to a block at an average rate of one nut every fifteen seconds during the majority of her shift. *High Capacity Prods. v. Moore*, 61 Ark. App. 1, 962 S.W.2d 831 (1998).

A physician's letter and office notes constituted sufficient evidence to support the Workers' Compensation Commission's finding that an employee's work aggravated his osteoarthritis where the letter stated that the employee's required use of his hands was "likely to aggravate os-

teoarthritis of the hands" and that the employee should avoid repetitive use of his hands and where the report stated that it seemed that the employee's repetitive motions had led to a large portion of his osteoarthritis and tendinitis. *Tyson Foods, Inc. v. Griffin*, 61 Ark. App. 222, 966 S.W.2d 914 (1998).

Employee's job involved rapid repetitive motion where the job involved motions that were repeated 115 to 120 times per day separated by periods of only 1.5 minutes. *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998).

The standard for determining "rapid repetitive motion" is a two-pronged test: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. *Malone v. Texarkana Pub. Sch.*, 333 Ark. 343, 969 S.W.2d 644 (1998).

The Workers' Compensation Commission erred by applying a definition of "rapid repetitive motion" that had been rejected and held to be too restrictive when it determined that, although the claimant's job involved the use of her hands in all of her duties, it did not require the exact or almost exact movement again and again for prolonged periods of time sufficient to constitute rapid, repetitive motion. *Malone v. Texarkana Pub. Sch.*, 333 Ark. 343, 969 S.W.2d 644 (1998).

The claimant, who was a custodian in a public school, failed to establish an injury caused by rapid repetitive motion where the claimant performed several different tasks each day and her supervisor testified that her work was not rapid in nature. *Malone v. Texarkana Pub. Sch.*, 333 Ark. 343, 969 S.W.2d 644 (1998).

An incisional hernia caused by gradual heavy lifting was not a compensable injury caused by rapid repetitive motion; although the motion which caused the injury was repetitive, it was not rapid. *Jobe v. Wal-Mart Stores, Inc.*, 66 Ark. App. 114, 987 S.W.2d 764 (1999).

Evidence established that rapid repetitive motion caused the claimant's bilateral knee injuries where she spent a substantial amount of time making back and forth motions on her knees while stocking store shelves. *Patterson v. Frito Lay, Inc.*, 66 Ark. App. 159, 992 S.W.2d 130 (1999).

Epicondylitis, or "tennis elbow," has not been designated as a specifically recognized injury under "rapid repetitive mo-

tion," and, consequently, a claimant bears the burden of proving that rapid repetitive motion caused such condition. *Freeman v. Con-Agra Frozen Foods*, 27 S.W.3d 762 (Ark. Ct. App. 2000).

The claimant established that her bilateral carpal tunnel syndrome and bilateral epicondylitis, or "tennis elbow," arose out of and in the course of her employment, which involved assembling frozen dinner trays on a production line, where (1) she testified that her duty on the production line was to place the correct portion of food into the frozen dinner tray, making certain that there was not too much nor too little food in each triangle portion of the tray, and that she was responsible for filling approximately 65 dinners per minute, and (2) a physician opined that her conditions were consistent with her job description. *Freeman v. Con-Agra Frozen Foods*, 27 S.W.3d 762 (Ark. Ct. App. 2000).

Evidence was sufficient to establish that the claimant's neck injury was caused by rapid repetitive movement where (1) over the course of a nine to ten hour shift, the claimant completed 316 units, each of which had six screws, and (2) the claimant testified that she had to stoop over and bend her head or neck a little for each screw inserted into every unit. *Hapney v. Rheem Mfg. Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000).

The Workers' Compensation Commission erred in denying benefits for the claimant's carpal tunnel syndrome, notwithstanding that she first experienced shooting pains in her wrists while wiping up some spilled tea from a kitchen counter in her home and admitted that she did not initially report problems she had with her hands because she believed that pain was simply a "part of the job," where (1) the claimant testified in detail about her job duties that required extensive use of her hands and wrists and also testified that she had no prior injury that could be related to her current problems and denied engaging in any outside activities that could have caused carpal tunnel syndrome, (2) the claimant submitted her medical records, which included the medical opinions of two of her treating physicians, (3) one physician stated in his letter that the claimant's injuries were overuse-type injuries consistent with her job duties, and (4) the second physician concurred with the first physician that the

claimant's injuries were usage-related type injuries often associated with repetitive motions, but declined to state definitively whether the claimant's job, or some outside activities, were the cause of her injuries. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

Employee, a volleyball coach and physical-education teacher, did not establish that she sustained a gradual-onset throat injury caused by rapid repetitive motion as the Workers' Compensation Commission improperly applied prior case law in finding the internal vibrations of the vocal cords to be tasks as opposed to the act of speech. *Westside High Sch. v. Patterson*, 79 Ark. App. 281, 86 S.W.3d 412 (2002).

—Recurrence.

If an injury flares up a second time without an intervening cause and creates a second disability, it is a recurrence of the first compensable injury and the employer remains liable; a recurrence is not a new injury but simply another period of incapacitation resulting from the previous injury. *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S.W.2d 897 (1996).

—Sexual Harassment.

This chapter does not exclude sexual harassment claims where the claimant sustains a compensable injury arising out of and in the course of the employment relationship. *Phillips v. Arkansas State Hwy. & Transp. Dep't*, 52 Ark. App. 170, 916 S.W.2d 128 (1996).

To determine whether an injury arises out of employment, the Commission should apply the same rule to sexual harassment cases that it applies in assault cases: an injury arises out of the employment if the risk is increased by the nature or setting of the work; whether sexual harassment is a risk to which an employee is exposed because of the nature of the work environment is a fact that should be decided on a case-by-case basis. *Phillips v. Arkansas State Hwy. & Transp. Dep't*, 52 Ark. App. 170, 916 S.W.2d 128 (1996).

—Specific Incident.

Employee was denied benefits for injury allegedly caused by a specific traumatic incident, where the medical evidence was silent as to the causal connection between his disability and a specific traumatic incident. *Lay v. UPS*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

The claimant's neck injury was not compensable on the basis that it was caused by a specific incident and was identifiable by time and place of occurrence where the claimant's own deposition testimony reflected that she did not know how she was injured, that she did not recall anything specific happening, and that she did not tell her treating physician that her pain was associated with any particular, specific incident. *Hapney v. Rheem Mfg. Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000).

Employee failed to prove by a preponderance of the evidence that she sustained an injury to her left shoulder resulting from a specific incident where employer's medical department supervisor testified that she helped employee file the first report of injury and that employee described the injury to herself as something that gradually happened to her shoulder after shoveling ice the previous month; the court could not say that no reasonable, fair-minded person could have reached the conclusion arrived at by the Arkansas Workers' Compensation Commission. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, 218 S.W.3d 351 (2005).

Finding that the employee failed to prove a compensable injury caused by a specific incident identifiable by time and place of occurrence was proper under subdivision (4)(A) of this section because his treating physicians reported no acute event but instead indicated that he developed an injury to his toe by working in work boots that were too narrow. The employee testified that he did not feel any soreness until he had been working his regular duties for a couple of hours. *Pearson v. Worksource*, 2011 Ark. App. 751, — S.W.3d — (2011).

—Work-Related.

Where employee of a medical center was headed off to lunch and slipped on a puddle of spilled coffee outside the elevator, the Arkansas Workers' Compensation Commission properly denied her claim for benefits because she was not performing employment services at the time of her injury. *Robinson v. St. Vincent Infirmary Med. Ctr.*, 88 Ark. App. 168, 196 S.W.3d 508 (2004).

Where the Commission reversed the decision of the ALJ and awarded no benefits pursuant to its finding that complainant failed to prove that his back condition was

the result of any work-related incident, the court reversed the Commission's decision because their denial of compensability was not supported by any substantial evidence. *Frances v. Gaylord Container Corp.*, 69 Ark. App. 26, 9 S.W.3d 550 (2000), *aff'd*, 341 Ark. 527, 20 S.W.3d 280 (2000).

While the removal of gravel from a temporary dump site by the employee may have advanced the employer's interests, at least indirectly, the removal of it for his own personal use was not inherently necessary to his job; it also was not necessary at the time and place of the occurrence for the employee to have been loading gravel at all. *Smith v. City of Fort Smith*, 84 Ark. App. 430, 143 S.W.3d 593 (2004).

Going-and-coming rule precluded the employee's recovery as his accident occurred while he was simply traveling home; the Workers' Compensation Commission did not err in concluding that the employer provided the employee with transportation as a gratuity to the employee, rather than for a benefit to the employer. *Swearengen v. Evergreen Lawns*, 85 Ark. App. 61, 145 S.W.3d 830 (2004).

Where a claimant suffers an unexplained injury at work, it is generally compensable; thus, employee who twisted his knee exiting the driver's compartment of a cement truck suffered a compensable injury. *Crawford v. Single Source Transp.*, 87 Ark. App. 216, 189 S.W.3d 507 (2004).

Employee is performing "employment services" when he is engaging in an activity that carries out an employer's purpose or advances the employer's interest; thus, where employee stepped off the elevator to retrieve her lunch and slipped in a puddle of coffee, the employee did not suffer a compensable injury because she was not performing employment services at the time of her injury. *Robinson v. St. Vincent Infirmary Med. Ctr.*, 88 Ark. App. 168, 196 S.W.3d 508 (2004).

Accident that occurred while employee was going to get breakfast for all nurses in an intensive care unit was compensable under this section because the activity served to at least indirectly advance the interest of the employer by reducing the time that the unit was short-staffed. *Ark. Methodist Hosp. v. Hampton*, 90 Ark. App. 288, 205 S.W.3d 848 (2005).

Where employee fell while walking across a board over a ditch while returning from his break, he was entitled to benefits as he was performing employment services at the time of injury; employee had remained on the clock and was not able to leave the workplace during his break. *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006).

Arkansas Workers' Compensation Commission's finding that employee's carpal-tunnel and cubital-tunnel injuries were compensable was proper given the employee's extensive testimony and testimony from her coworkers; further, employee's physician opined that employee's injuries were related to her repetitive duties as a grill cook. *Cottage Cafe, Inc. v. Collette*, 94 Ark. App. 72, 226 S.W.3d 27 (2006).

There was no substantial evidence to support the Arkansas Workers' Compensation Commission's conclusion that employee was not performing employment services when he was injured as employee was carrying out the employer's purpose and advancing its interest when the injury occurred. *Richard Kimbell v. Ass'n of Rehab Indus. & Business Companion Property & Casualty*, 366 Ark. 297, 235 S.W.3d 499 (2006).

Intoxicants.

Workers' Compensation Commission had a substantial basis for denying relief to an employee because the presence of marijuana metabolites in his urine sample created a rebuttable presumption, not overcome, that the injury was substantially occasioned by the use of illegal drugs. *Waldrup v. Graco Corp.*, 101 Ark. App. 101, 270 S.W.3d 891 (2008), review denied, 2008 Ark. LEXIS 273 (Ark. Apr. 24, 2008).

Employee's refusal of his employer's request to take a hair-follicle test four days after he wrecked a large truck did not trigger the statutory presumption of intoxication found in subdivision (4)(B)(iv)(b) of this section. The police officer at the scene of the accident indicated that the employee appeared normal and no alcohol or drugs were observed. *Curt Bean Transp., Inc. v. Hill*, 2009 Ark. App. 760, 348 S.W.3d 56 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 1000 (Dec. 16, 2009), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 127 (Feb. 25, 2010).

Injured employee's negligence action against an employer was barred by subdivisions (4)(B)(iv)(a)-(d) of this section and the Worker's Compensation Commission's decision that the claim was not compensable because the employee tested positive for illegal drugs at the time of the accident. *Hickey v. Gardisser*, 2010 Ark. App. 464, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 591 (July 28, 2010).

Substantial evidence supported a decision by the Arkansas Workers' Compensation Commission that an employee rebutted the presumption in subdivision (4)(B)(iv)(b) of this section that a work-related injury was substantially occasioned by the employee's use of methadone because the Commission found credible: (1) the employee's testimony he ingested the methadone days before the accident; (2) the testimony by the employee's expert toxicologist that effects of the drug would have dissipated within 24 hours; (3) testimony by a co-worker and a supervisor that the employee did not seem impaired the day of the accident; and (4) testimony describing the accident as a highly unusual event and there was nothing the employee did to cause the accident or could have done to prevent its occurrence. *Telling Indus. v. Petty*, 2010 Ark. App. 602, — S.W.3d — (2010).

Finding that the employee in a workers' compensation action failed to prove that his injuries were compensable was appropriate pursuant to subdivision (4)(B)(iv)(b) of this section because the presence of marijuana metabolites in a drug test triggered the statutory presumption that his injuries were substantially occasioned by the use of illegal drugs and the employee failed to rebut that presumption. *Edmisten v. Bull Shoals Landing*, 2012 Ark. App. 44, — S.W.3d — (2012).

Finding that the employee in a workers' compensation action failed to rebut the legal presumption set out in subdivision (4)(B)(iv)(b) of this section that his accident and injury at work were substantially occasioned by his use of marijuana was appropriate because the employee failed to rebut the presumption that the injuries were substantially occasioned by his use of marijuana. *Prock v. Bull Shoals Landing*, 2012 Ark. App. 47, — S.W.3d — (2012).

Finding that the employee failed to rebut the presumption that an injury he sustained was substantially occasioned by his use of marijuana was appropriate pursuant to subdivision (4)(B)(iv)(b) of this section because there was evidence that his injury occurred through no fault of the twist-and-tuck winder, contrary to his assertion. *Townley v. Ga. Pac. Corp.*, 2012 Ark. App. 48, — S.W.3d — (2012).

Legislative Intent.

With respect to this section and § 11-9-527, which were unconstitutionally gender-based statutes, it was the legislature's intent to provide compensation for the death of an employee, and to make compensation available equally for a widow and widower would be more consistent with the legislative purpose than to exclude widows; thus, the employer could not successfully argue that deletion of the unconstitutional portions of these sections was not the proper way to equalize treatment for widows and widowers. *Russell v. International Paper Co.*, 2 Ark. App. 355, 621 S.W.2d 867 (1981) (decision prior to 1981 amendment).

Major Cause.

For an accidental injury, it is not necessary that the claimant prove that the injury is the major cause of the disability or need for treatment. *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000).

Substantial evidence did not support the conclusion that the claimant's motor vehicle accident was substantially occasioned by his use of alcohol where (1) both drivers had a blood alcohol content of more than twice the legal limit at the time of the accident, but (2) the other driver came completely over into the claimant's lane and struck his vehicle head-on, and (3) although a time stamped receipt in the claimant's vehicle showed that he had been speeding at some point, there was no evidence that he was speeding at the time of the accident or that he could have avoided the accident. *Clark v. Sbarro, Inc.*, 67 Ark. App. 372, 1 S.W.3d 38 (1999).

Where worker began to experience pain and it was determined that her rapid repetitive motion injury was an aggravation of a preexisting condition, the appellate court held that the Workers' Compensation Commission was clearly wrong in

its decision that the "major cause" requirement of subdivision (4)(E) of this section categorically could not be established by a showing that an asymptomatic preexisting condition became symptomatic and required treatment due to a work-related aggravation of that condition. *Parker v. Atl. Research Corp. Ins. Co.*, 87 Ark. App. 145, 189 S.W.3d 449 (2004).

Arkansas Workers' Compensation Commission wrongfully denied employee permanent disability benefits as it erred in finding that an aggravation of a preexisting back condition was not capable of meeting the major-cause requirement of subdivision (4)(F)(ii) of this section. *Pollard v. Meridian Aggregates*, 88 Ark. App. 1, 193 S.W.3d 738 (2004).

Arkansas Workers' Compensation Commission erred under subdivisions (4)(F)(ii)(a) and (b) of this section in finding that an employee was not entitled to permanent partial disability benefits because his permanent impairment was caused solely by his degenerative condition rather than by a work accident, as his degenerative condition was asymptomatic prior to the accident and then symptomatic thereafter, such that the major-cause requirement was satisfied. *Leach v. Cooper Tire & Rubber Co.*, 2011 Ark. App. 571, — S.W.3d — (2011).

In a workers' compensation case, a five-percent permanent-partial disability rating was supported by substantial evidence because there was reliance upon a medical report for objective findings to support the rating. The major cause of the rating was a compensable thoracic injury, which required surgical intervention. *Walgreen Co. v. Goode*, 2012 Ark. App. 196, — S.W.3d — (2012).

Medical Opinions.

The use of the word "probably" is sufficient to satisfy the requirement of subdivision (16)(B) that medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

Neither the Arkansas Workers' Compensation Commission nor the court has the authority to extend or limit coverage by finding a constructive release when subdivision (16)(B) of this section specifically requires a medical opinion regarding

impairment and compensability to be within a reasonable degree of medical certainty. *Bingle v. Quality Inn*, 96 Ark. App. 312, 241 S.W.3d 271 (2006).

Order from the Arkansas Workers' Compensation Commission that employee was entitled to temporary total disability only through August 14, 2001, was overturned where the Commission's substitution of a medical opinion with its own finding of a constructive release was arbitrary and contrary to subdivision (16)(B) of this section. *Bingle v. Quality Inn*, 96 Ark. App. 312, 241 S.W.3d 271 (2006).

Where a neurosurgeon wrote that the employee suffered a work injury when she fell from a ladder, his opinion regarding the cause of the employee's herniated discs was unequivocal; the appellate court concluded that his opinion was stated within a reasonable degree of medical certainty, as required by subdivision (16)(B) of this section. *Wal-Mart Assocs. v. Davis*, 98 Ark. App. 422, 256 S.W.3d 517 (2007).

Finding that an employee in a workers' compensation action was not entitled to medical treatment from a doctor in connection with the employee's compensable back injury was appropriate because the doctor's statement that the injuries "could" have been caused by her accident at work was insufficient under subdivision (16)(B) of this section. *Hawley v. First Sec. Bancorp*, 2011 Ark. App. 538, — S.W.3d — (2011).

Medical Services.

Employee would be permitted treatment by out-of-state physician, where it would violate the employer's statutory duty to provide medical care if that care was denied simply because there was no medical service provider in Arkansas qualified and willing to provide the service. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997), *supp. op.*, *Clark v. Director, Empl. Sec. Dep't*, 58 Ark. App. 1, 944 S.W.2d 862.

Objective Findings.

Physician's diagnosis of carpal tunnel syndrome was not supported by "objective findings" as defined by subdivision (16)(A)(i) where the results of each of the tests performed by the physician were based on the patient's description of the sensations produced by various stimuli;

such descriptions are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. *Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996).

Doctor's direct observation of a 5 cm fibrous mass constituted an "objective finding" under subdivision (16). *Daniel v. Firestone Bldg. Prods.*, 57 Ark. App. 123, 942 S.W.2d 277 (1997).

Claimant's inability to bend more than ninety degrees was not an "objective finding" under subdivision (16). *Cox v. CFSI Temporary Emp.*, 57 Ark. App. 310, 944 S.W.2d 856 (1997).

Physician's remarks about an acidic solution such as wheel cleaner being able to cause irregular corneal astigmatism were stated within a reasonable degree of medical certainty as required by subdivision (16)(B). *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998).

There was no objective medical evidence of the claimant's injury where the only arguably objective medical evidence of the injury was a notation at a clinic that there was a contusion of the lumbar spine, but reasonable minds could conclude that a contusion to such an internal structure could not be seen and therefore did not constitute objective medical evidence of an injury. *Meister v. Safety Kleen*, 65 Ark. App. 259, 987 S.W.2d 749 (1999), *rev'd*, *Meister v. Kleen*, 339 Ark. 91, 3 S.W.3d 320 (Ark. 1999).

The findings of muscle spasms by a physical therapist can constitute objective findings, notwithstanding that a physical therapist is unqualified to state a medical opinion to a reasonable degree of medical certainty; an objective finding is not synonymous with or otherwise based on medical opinion. *Continental Express, Inc. v. Freeman*, 66 Ark. App. 102, 989 S.W.2d 538 (1999), *aff'd*, 339 Ark. 142, 4 S.W.3d 124 (Ark. 1999).

Objective medical evidence is necessary to establish the existence and extent of an injury but not essential to establish the causal relationship between the injury and a work-related accident. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

Although muscle spasms are involuntary and constitute an objective finding, muscle tenderness is measured by a patient's subjective reaction to stimuli and

does not constitute an objective finding. *Kimbrell v. Arkansas Dep't of Health*, 66 Ark. App. 245, 989 S.W.2d 570 (1999).

The claimant provided objective evidence of an internal contusion where a orthopedist conducted an x-ray examination about one month after the claimant's fall which corroborated the contusion that the claimant's treating physician originally diagnosed. *Meister v. Kleen*, 339 Ark. 91, 3 S.W.3d 320 (Ark. 1999).

Muscle spasms constitute objective findings. *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (Ark. 1999).

An objective finding is not synonymous with and need not be based on a medical opinion. *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (Ark. 1999).

A medical opinion addressing compensability of the claimant's carpal tunnel syndrome was given within a reasonable degree of medical certainty as required by subsection (16) of this section where the physician gave the opinion that if the work was repetitive (which it was), it likely could precipitate or aggravate the wrist condition. *Crudup v. Regal Ware, Inc.*, 69 Ark. App. 206, 11 S.W.3d 567 (2000), rev'd, 341 Ark. 804, 20 S.W.3d 900 (2000).

A medical opinion addressing the compensability of the claimant's carpal tunnel syndrome did not satisfy the statutory requirement that such opinions be stated within a reasonable degree of medical certainty where the medical opinion stated only that the claimant's working conditions "could have" caused his symptoms and that a review of his working conditions would make it easier to determine if the carpal tunnel syndrome was related to the claimant's employment. *Crudup v. Regal Ware Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000).

A range-of-motion test performed on the claimant constituted objective findings under subdivision (16)(A)(i) where the test performed was not one in which the limb was actively moved by the claimant, but instead was a test in which the limb was moved passively by the examiner. *Hayes v. Wal-Mart Stores*, 71 Ark. App. 207, 29 S.W.3d 751 (2000).

A finding of muscle tightness was not equivalent to a finding of muscle spasms and did not constitute an objective finding

since there was no evidence to suggest that the findings of muscle tightness were actually muscle spasms or that the tightness was involuntary. *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001).

While the pulmonary-function test results required the worker to give maximum effort, whether she did so could be shown by objective chemical data; thus, the test was an "objective finding" that supported the award of workers' compensation benefits. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

Though the worker could control her responses to the neuropsychological testing, as there was no evidence that she manipulated the testing, and there was other objective evidence that showed she suffered a compensable brain injury, the workers' compensation commission erred in denying her claim for additional benefits. *Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001), overruled, *Parson v. Ark. Methodist Hosp.*, — Ark. App. LEXIS —, — S.W.3d —, 2008 Ark. App. LEXIS 619 (Sept. 24, 2008).

Notation in the medical records of an employee who claimed to have injured his back while lifting a large mixing pot at work that the employee was suffering muscle spasms was sufficient to satisfy the requirement of subdivision (4)(D) that a workers' compensation claim based on accidental injury be supported by objective medical findings. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001).

Evidence that a worker suffered muscle spasms and that an MRI examination revealed an injury to a disk in her back as a result of being hit by a cart that was being pushed by a co-worker, was sufficient to satisfy the requirement that a worker's compensation claim be supported by objective medical findings, as that term was defined in subdivision (16) of this section. *Wal-Mart Stores v. Sands*, 80 Ark. App. 51, 91 S.W.3d 93 (2002).

Order awarding temporary total disability benefits to an employee who fell off a ladder and landed on a concrete floor was upheld because substantial evidence was presented that her compensable injury was established by medical evidence supported by "objective findings," as required by subdivision (4)(D) of this sec-

tion. *Fred's, Inc. v. Jefferson*, 361 Ark. 258, 206 S.W.3d 238 (2005).

Objective medical evidence, including pulmonary function test results and a doctor's opinion, showed that employee seeking workers' compensation had a 50% impairment due to silicosis and, for purposes of this section and § 11-9-704(c)(1)(B), the pulmonary-function test was an objective test despite the fact that the employee was at least partially able to control his breathing and may not have made a full effort during each breathing test. *DeQueen Sand & Gravel Co. v. Cox*, 95 Ark. App. 234, 236 S.W.3d 5 (2006).

Pursuant to this section, the employee failed to set forth two objective findings supporting her claim of a compensable injury where there was nothing in the medical records indicating why the employee was prescribed the medication at issue and the physician testified that her neurological examination was within the normal limits. *Rodriguez v. M. McDaniel Co.*, 98 Ark. App. 138, 252 S.W.3d 146 (2007).

Workers' compensation benefits claimant failed to prove that he sustained a work-related organic brain injury because his neuropsychological testing and his own testimony, without more, did not constitute objective findings under subdivision (16)(A)(i) of this section and did not establish an organic brain injury under subdivision (4)(D) of this section. *Rippe v. Delbert Hooten Logging*, 100 Ark. App. 227, 266 S.W.3d 217 (2007).

Where the employee allegedly sustained a left-knee injury, the Arkansas Workers' Compensation Commission erred by finding that she had a compensable injury without making a finding about whether the employee's muscle "guarding" constituted an objective or subjective finding under subdivisions (4)(A)(i) and (4)(D) of this section. The Commission's opinion lacked a finding about whether the doctor concluded that the employee's muscle "guarding" was voluntary or involuntary. *The Steak House v. Weigel*, 101 Ark. App. 81, 270 S.W.3d 365 (2007).

Judgment of Arkansas Workers' Compensation Commission that an employee failed to prove that he suffered compensable knee and shoulder injuries was reversed because the contusion diagnosis with no conflicting testimony about the

nature of the contusion satisfied the objective-nature findings requirement of subdivisions (4)(A)(i) and (4)(D) of this section. *Ellis v. J.D. & Billy Hines Trucking, Inc.*, 104 Ark. App. 118, 289 S.W.3d 497 (2008).

Workers' compensation claimant failed to prove by a preponderance of the evidence that impairment ratings to the left hand and elbow were associated with a work-related injury because the claimant failed to cite any medical authority for such a connection, instead presenting only the claimant's own testimony and subjective responses to active range-of-motion testing, which did not amount to objective findings. *Wilson v. Smurfit*, 2009 Ark. App. 800, — S.W.3d — (2009).

Decision of the Arkansas Workers' Compensation Commission that an employee's neck injury was compensable was supported by substantial evidence because on the day of the incident, the employee sought treatment in an emergency room (ER), and the ER doctor noted twice that she was having muscle spasms in her neck on the day she was injured; those findings satisfied the objective-medical-evidence requirement of subdivision (4)(D) of this section. *St. Vincent Health Servs. v. Bishop*, 2010 Ark. App. 141, — S.W.3d — (2010).

Scar across the forehead of a workers' compensation claimant, who suffered a fall while tightening a nylon strap on a load of baled cardboard, was sufficient objective evidence of permanent physical injury under subdivision (16)(A) of this section where the medical expert supported his opinion that there was damage to the trigeminal nerve with the claimant's history, an examination, the scar, and the AMA Guides to the Evaluation of Permanent Impairment (4th Ed. 1993). *Wayne Smith Trucking, Inc. v. McWilliams*, 2011 Ark. App. 414, — S.W.3d — (2011).

Arkansas Workers' Compensation Commission did not err in finding that an employee failed to prove that the employee was permanently and totally disabled after a 400-pound steel bar hit the employee on top of the head; while the employee's chief complaint was ongoing pain, under subdivision (16)(A)(ii)(a) of this section, the Commission could not consider complaints of pain. *Kelley v. Cooper Std. Auto.*, 2011 Ark. App. 665, — S.W.3d — (2011).

Arkansas Workers' Compensation Commission's opinion fell short of the minimum requirements and could not be reviewed in any meaningful way because the Commission failed to perform its duty in conducting a de novo review of the administrative law judge's opinion. The Commission merely attacked one finding the ALJ made. *Serrano v. Westrim, Inc.*, 2011 Ark. App. 771, — S.W.3d — (2011).

Objective findings under subdivision (16)(A)(i) of this section, including medical reports, x-rays, and MRI results, provided substantial evidence to support the decision of the Arkansas Workers' Compensation Commission that appellant suffered from a degenerative condition in his low back - not an aggravation or new injury. A medical report documented appellant's prior history of back complaints; and x-rays taken the day after the incident demonstrated degenerative changes. *Barber v. Pork Group, Inc.*, 2012 Ark. App. 138, — S.W.3d — (2012).

Physical Impairment.

The term "anatomical impairment" means the anatomical loss as reflected by the common usage of medical impairment ratings; wage-loss disability is something entirely different. *Fox v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996).

Because an employee failed to prove a permanent impairment under § 11-9-704(c)(1)(B) and subdivision (16)(A)(i) of this section, and because the Workers' Compensation Commission could consider the conflicting medical evidence and give less weight to one opinion, there was substantial evidence to support the denial of the employee's claim for workers' compensation benefits. *Pruitt v. Healthsouth Corp.*, 2011 Ark. App. 776, — S.W.3d — (2011).

Substantial Evidence.

Order denying an employee workers' compensation benefits was upheld where there was substantial evidence to support the determination that the employee was engaged in horseplay at the time of the injury, when the employee demonstrated some type of kick or aerobic exercise, which was not performance of employment services. The injury was not compensable under subdivision (4)(B)(i) of this section. *Mize v. Res. Power*, 99 Ark. App. 415, 261 S.W.3d 477 (2007).

Substantial evidence supported the Workers' Compensation Commission's denial of benefits based on an alleged work-related injury in September 2003 because the claimant failed to put forth any medical evidence supported by objective findings demonstrating that he suffered a compensable aggravation of his previous back injury. It was undisputed that the claimant suffered from chronic, severe back pain since at least 1997 and he admitted that he never fully recovered from that injury, and continued seeking treatment and medication without significant improvement; after the claimant's injury in September 2003, his treating physician did not indicate any sort of work-related accident or injury in his notes from an examination of the claimant two days after the incident and did not indicate any objective findings such as bruising, swelling, or spasms in the claimant's back. *Long v. Wal-Mart Stores*, 98 Ark. App. 70, 250 S.W.3d 263 (2007), review denied, *Long v. Wal-Mart Stores, Inc.*, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 428 (May 3, 2007).

There was substantial evidence to support the findings of a twelve percent anatomical impairment, because the first doctor's opinion that the compensable injury was the major cause of the claimant's anatomical impairment was substantial evidence to support the finding to that effect, and the Arkansas Workers' Compensation Commission simply decided to believe the testimony of one doctor rather than the other and the appellate court was powerless to reverse the Commission. *Gaither Appliance v. Stewart*, 103 Ark. App. 276, 288 S.W.3d 690 (2008).

Arkansas Workers' Compensation Commission's award of benefits to an employee was affirmed because there was substantial evidence to show that the employee proved the gradual onset, work-relatedness, and major cause elements necessary to establish a compensable injury pursuant to subdivision (4) of this section. The evidence showed that the employee worked for an employer at the same task with approximately 1,000 shoes per day for 30 years. *Addison Shoe Co. v. Moody*, 2009 Ark. App. 797, — S.W.3d — (2009).

Judgment from the Arkansas Workers' Compensation Commission denying an employee's request for benefits related to a back injury based on the employee's

failure to prove a causal connection under this section was affirmed because the Commission did not arbitrarily disregard evidence but rather deciphered the evidence without resort to speculation or conjecture. *Ausler v. Hunt*, 2009 Ark. App. 801, — S.W.3d — (2009).

Substantial evidence supported the Arkansas Workers' Compensation Commission's determination that an employee did not sustain a compensable injury under this section when the employee fell at work because the Commission had the authority to accept or reject medical opinions and its resolution of the medical evidence had the force and effect of a jury verdict. *Osborne v. Booneville Human Dev. Ctr.*, 2010 Ark. App. 315, — S.W.3d — (2010).

Substantial evidence supported the determination by the Arkansas Workers' Compensation Commission that an employee's back injury was compensable as a new injury or as an aggravation of his previously asymptomatic degenerative condition pursuant to subdivision (4)(A)(i) of this section. *Leach v. Cooper Tire & Rubber Co.*, 2011 Ark. App. 571, — S.W.3d — (2011).

Temporary Total Disability.

Where appellee employee sustained a compensable injury when a forklift struck him in his right hip and back area, substantial evidence supported the decision of the Arkansas Workers' Compensation Commission denying him temporary disability benefits under subdivision (12) of this section because the employee had a medical release to work for two years after he suffered his injury before he was terminated from his employment. *Tyson Chicken, Inc. v. Witherspoon*, 2012 Ark. App. 99, — S.W.3d — (2012).

Wages.

The clear wording of the statutory definition of wages makes no provision for combining wages from concurrent employments in determining benefits. *Curtis v. Ermert Funeral Home & Ins. Co. of N. Am.*, 4 Ark. App. 274, 630 S.W.2d 57 (1982).

Section 11-9-518 concerns itself exclusively with the determination of average weekly wage, and the definition of the word wage is controlled and supplied by subdivision (8); it makes no provision for

combining those wages with concurrent employment. *Curtis v. Ermert Funeral Home & Ins. Co. of N. Am.*, 4 Ark. App. 274, 630 S.W.2d 57 (1982).

In determining an employee's wage rate for compensation benefits, an employer's contributions to an employee's fringe benefits of medical, life, and disability insurance should not be included in the term "wages." *Tabor v. Levi Strauss & Co.*, 33 Ark. App. 71, 801 S.W.2d 311 (1990).

Subdivision (19) of this section embraces a much more inclusive concept of what constitutes compensation than does the National Council on Compensation Insurance guidelines. *Eckhardt v. Willis Shaw Express, Inc.*, 62 Ark. App. 224, 970 S.W.2d 316 (1998).

Per diem payments to an employee to reimburse him for meals, lodging, and incidentals should have been included in the calculation of his average weekly wage under § 11-9-518(a)(1) because they fell within the definition of wages under subdivision (19) of this section. The per diem payments saved the employee from expending other funds to acquire those advantages, and the employee had the option to retaining any unused per diem funds, thereby increasing his income. *Plane Techs v. Keno*, 103 Ark. App. 121, 286 S.W.3d 774 (2008).

Widows and Widowers.

Where there was evidence that woman was not living with decedent nor dependent on him for support at the time of his death she did not meet the statutory requirements necessary to entitle her to receive a widow's benefits. *Stephens & Stephens v. Logan*, 260 Ark. 78, 538 S.W.2d 516 (1976).

Claimant, who was not living with the deceased nor dependent upon him at the time of his death, was entitled to no benefits under this chapter as a widow. *Spratlin v. Evans*, 260 Ark. 49, 538 S.W.2d 527 (1976).

The addition of the word actually, in § 11-9-527(c), was intended to change what amounted to a conclusive presumption of dependency under prior cases; it follows that when the widow was not living with the employee at the time of his death, there must be some showing of actual dependency. *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979).

Arkansas Workers' Compensation Commission was required to reconsider

whether or not an executrix, who married an employee after his injury but before his death, was entitled to widow's benefits because it misapplied § 11-9-527 in that it failed to reconcile the definition of widow under subdivision (20)(A) of this section with the requirements of § 11-9-527(c) and (h). The executrix was required to show that she was a widow and that she was dependent upon the employee at the time of the injury; marriage at the time of the injury was not required. *Estate of Slaughter v. City of Hampton Mun. League WC Trust*, 102 Ark. App. 373, 285 S.W.3d 669 (2008), review denied, *Estate of Slaughter v. City of Hampton*, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 786 (Dec. 19, 2008).

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Layne-Arkansas Co. v. Henderson*, 221 Ark. 691, 255 S.W.2d 423 (1953); *Clark v. Ottenheimer Bros.*, 229 Ark. 383, 314 S.W.2d 497 (1958); *Bottoms Baptist Orphanage v. Johnson*, 240 Ark. 175, 398 S.W.2d 544 (1966); *McNeely v. Clem Mill & Gin Co.*, 241 Ark. 498, 409 S.W.2d 502 (1966); *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969); *Ray v. Shelnutt Nursing Home*, 246 Ark. 575, 439 S.W.2d 41 (1969); *Irby v. Davis*, 311 F. Supp. 577 (E.D. Ark. 1970); *Empire Life & Hosp. Ins. Co. v. Armored Planting Co.*, 247 Ark. 994, 449 S.W.2d 200 (1970); *International Paper Co. v. McGoogan*, 255 Ark. 1025, 504 S.W.2d 739 (1974); *Maryland Cas. Co. v. Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974); *Mohawk Tire & Rubber Co. v. Brider*, 257 Ark. 587, 518 S.W.2d 499 (1975); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Shippers Transp. v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979); *Lybrand v. Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979); *Revere Copper & Brass, Inc. v. Birdsong*, 267 Ark. 922, 593 S.W.2d 54 (1979); *Alfred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980); *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980); *Hunter Mem. United Methodist Church v. Millirons*, 268 Ark. 975, 597 S.W.2d 845 (Ct. App. 1980); *Halstead Indus. v. Jones*, 270 Ark. 85, 603 S.W.2d 456 (Ct. App. 1980); *Pyles v. Triple F. Feeds of Texas, Inc.*, 270 Ark. 729, 606 S.W.2d 146

(Ct. App. 1980); *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (Ark. 1981); *Hamilton v. Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982); *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983); *Cornish Welding Shop v. Galbraith*, 278 Ark. 185, 644 S.W.2d 926 (1983); *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984); *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir. 1985); *State Second Injury Fund v. Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985); *State Treasurer, Second Injury Fund v. Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985); *Masonite Corp. v. Mitchell*, 16 Ark. App. 209, 699 S.W.2d 409 (1985); *Marianna School Dist. v. Vandenburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985); *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988); *INA/Cigna Ins. Co. v. Simpson*, 27 Ark. App. 222, 772 S.W.2d 353 (1989); *County Mkt. v. Thornton*, 27 Ark. App. 235, 770 S.W.2d 156 (1989); *Eureka Log Homes v. Mantonya*, 28 Ark. App. 180, 772 S.W.2d 365 (1989); *Wade v. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Baldwin v. Club Prods. Co.*, 302 Ark. 404, 790 S.W.2d 166 (1990); *Weaver v. Tyson Foods*, 31 Ark. App. 147, 790 S.W.2d 442 (1990); *Holiday Inn-West v. Coleman*, 31 Ark. App. 224, 792 S.W.2d 345 (1990); *King v. Consolidated Freightways Corp.*, 763 F. Supp. 1014 (W.D. Ark. 1991); *Cook v. ALCOA*, 35 Ark. App. 16, 811 S.W.2d 329 (1991); *Lively v. Libbey Mem. Physical Medical Ctr.*, 317 Ark. 5, 875 S.W.2d 507 (1994); *Maxwell v. Carl Bierbaum, Inc.*, 48 Ark. App. 159, 893 S.W.2d 346 (1995); *Couch v. First State Bank*, 49 Ark. App. 102, 898 S.W.2d 57 (1995); *Crossett Sch. Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1995); *Craig v. Traylor*, 323 Ark. 363, 915 S.W.2d 257 (1996); *Cook v. Recovery Corp.*, 322 Ark. 707, 911 S.W.2d 581 (1995); *Dugan v. Jerry Sweetster, Inc.*, 54 Ark. App. 401, 928 S.W.2d 341 (1996); *Jefferson v. Munsey Prods., Inc.*, 55 Ark. App. 105, 930 S.W.2d 396 (1996); *City of Blytheville v. McCormick*, 56 Ark. App. 149, 939 S.W.2d 855 (1997); *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998); *GE Railcar Repair Servs. Workers' Comp. v. Hardin*, 62 Ark. App. 120, 969 S.W.2d

667 (1998); *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998); *Williford v. City of Little Rock*, 62 Ark. App. 198, 969 S.W.2d 687 (1998); *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998); *Williams v. Prostaff Temporaries*, 64 Ark. App. 128, 979 S.W.2d 911 (1998); *Needham v. Harvest Foods*, 64 Ark. App. 141, 987 S.W.2d 278 (1998); *Srebalus v. Rose Care, Inc.*, 69 Ark. App. 142, 10 S.W.3d 112 (2000); *Mayweather v. Mangum Constructing, Inc.*, 71 Ark. App. 322, 29 S.W.3d 783 (2000); *Tucker v. Roberts-McNutt, Inc.*, 342 Ark. 511, 29 S.W.3d 706 (2000); *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001); *Hislip v. Helena/West Helena Schs.*, 74 Ark. App. 395, 48 S.W.3d 566 (2001); *Cromwell v. Univ. of Ark.*, 76 Ark.

App. 5, 61 S.W.3d 864 (2001); *Bell v. Tri-Lakes Servs.*, 76 Ark. App. 42, 61 S.W.3d 867 (2001); *Cross v. Magnolia Hosp. Reciprocal Group of Am.*, 82 Ark. App. 406, 109 S.W.3d 145 (2003); *Automated Conveyor Sys. v. Dooley*, 360 Ark. 218, 200 S.W.3d 442 (2004); *Dixon v. Salvation Army*, 360 Ark. 309, 201 S.W.3d 386 (2005); *Garcia v. A&M Roofing*, 89 Ark. App. 251, 202 S.W.3d 532 (2005); *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005); *Rutherford v. Mid-Delta Cmty. Servs.*, 102 Ark. App. 317, 285 S.W.3d 248 (2008); *Finley v. Farm Cat, Inc.*, 103 Ark. App. 292, 288 S.W.3d 685 (2008); *Dick v. Conley Transp.*, 2009 Ark. App. 789, 358 S.W.3d 904 (2009); *Vite v. Vite*, 2010 Ark. App. 565, — S.W.3d — (2010).

11-9-103. Applicability.

(a) Every employer and every employee, unless otherwise specifically provided in this chapter, shall be subject to the provisions of this chapter and shall be bound thereby. However, nothing in this chapter shall be construed to conflict with any valid act of Congress governing the liability of employers for injuries received by their employees.

(b) This chapter shall apply only to claims for injuries and death based upon accidents which occur from and after December 2, 1948.

(c) The Workers' Compensation Law in effect prior to December 2, 1948, shall govern all rights in respect to claims for injuries and death based upon accidents occurring prior to the effective date of this chapter.

History. Init. Meas. 1948, No. 4, § 3, Acts 1949, p. 1420; A.S.A. 1947, § 81-1303.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided: "Nothing in the act, which originated as House Bill 2646 of 2001, nor

in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

ALR. Award of workers' compensation benefits to professional athletes. 112 A.L.R.5th 365.

Application of workers' compensation laws to illegal aliens. 121 A.L.R.5th 467.

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Appeals.

The specific provision in the Workers' Compensation Act providing that a notice of appeal may be filed within 30 days of the "receipt" of the order or award of the commission controls rather than the pro-

vision in ARAP 4 that requires the notice of appeal to be filed within 30 days from the "entry" of the judgment appealed from. *McCarty v. Board of Trustees*, 45 Ark. App. 102, 872 S.W.2d 74 (1994).

The time for filing the notice of appeal extends to the next business day when the last day for filing falls on a Saturday or Sunday. *McCarty v. Board of Trustees*, 45 Ark. App. 102, 872 S.W.2d 74 (1994).

The record on appeal from the Workers' Compensation Commission must be filed in the Court of Appeals within 90 days from the filing of the notice of appeal, as is required in other civil actions. *Tribble v. Heartland Express*, 45 Ark. App. 124, 872 S.W.2d 86 (1994).

Burden of Proof.

A finding that an employee is subject to the provision of this chapter requires more than just the proof of the employer-employee-carrier relationship; under § 11-9-102(5)(A) (now § 11-9-102(4)), there must also be proof that the injuries arose "out of and in the course of employment." *Lively v. Libbey Mem. Physical Medical Ctr.*, 317 Ark. 5, 875 S.W.2d 507 (1994).

Presumption.

There is no prima facie presumption that a claim comes within the provisions of this chapter. *Duke v. Pekin Wood Prods. Co.*, 223 Ark. 182, 264 S.W.2d 834 (1954).

Until 1993, a prima facie presumption existed that an injury did not result from intoxication of the injured employee while on duty; Acts 1993, No. 796 changed that presumption by deleting former § 11-9-707(4) and amending § 11-9-102(5)(B)(iv) (now § 11-9-102(4)). *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998), review denied, 334 Ark. 35, 970 S.W.2d 807 (1998).

Waiver.

Where employee, on her job application form, waived the right to sue clients of the employer for injuries covered by workers' compensation laws, she did not make a void agreement to absolve her employer of liability, but made a valid agreement relinquishing her right to bring additional claims for work-related injuries against employer's clients. *Edgin v. Entergy Operations, Inc.*, 331 Ark. 162, 961 S.W.2d 724 (1998).

Cited: *Wilson v. Beloit Corp.*, 869 F.2d 1162 (8th Cir. 1989).

11-9-104. Effect of unconstitutionality.

If any part of this chapter is adjudged unconstitutional by the courts and the adjudication has the effect of invalidating any payment of compensation under this chapter, the period intervening between the time the injury was sustained and the time of the adjudication shall not be computed as part of the time prescribed by law for the commencement of any action against the employer in respect of the injury, but the amount of any compensation paid under this chapter on account of the injury shall be deducted from the amount of damages awarded in the action in respect to the injury.

History. Init. Meas. 1948, No. 4, § 48, Acts 1949, p. 1420; A.S.A. 1947, § 81-1349.

CASE NOTES

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Appeals.

Constitutional Issues.

Appeals.

Substantial evidence supported the Workers' Compensation Commission's denial of benefits based on an alleged work-related injury in September 2003 because the claimant failed to put forth any medical evidence supported by objective findings demonstrating that he suffered a compensable aggravation of his previous back injury. It was undisputed that the claimant suffered from chronic, severe back pain since at least 1997 and he admitted that he never fully recovered from that injury, and continued seeking treatment and medication without significant improvement; after the claimant's injury in September 2003, his treating

physician did not indicate any sort of work-related accident or injury in his notes from an examination of the claimant two days after the incident and did not indicate any objective findings such as bruising, swelling, or spasms in the claimant's back. *Long v. Wal-Mart Stores*, 98 Ark. App. 70, 250 S.W.3d 263 (2007), review denied, *Long v. Wal-Mart Stores, Inc.*, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 428 (May 3, 2007).

Constitutional Issues.

The commission is required to rule on constitutional questions that are properly before it in order to provide the appeals court with fact-findings sufficient to decide the constitutional issue. *Green v. Smith & Scott Logging*, 54 Ark. App. 53, 922 S.W.2d 746 (1996).

Cited: *Michael v. Keep & Teach, Inc.*, 87 Ark. App. 48, 185 S.W.3d 158 (2004).

11-9-105. Remedies exclusive — Exception.

(a) The rights and remedies granted to an employee subject to the provisions of this chapter, on account of injury or death, shall be exclusive of all other rights and remedies of the employee, his legal representative, dependents, next of kin, or anyone otherwise entitled to recover damages from the employer, or any principal, officer, director, stockholder, or partner acting in his or her capacity as an employer, or prime contractor of the employer, on account of the injury or death, and the negligent acts of a coemployee shall not be imputed to the employer. No role, capacity, or persona of any employer, principal, officer, director, or stockholder other than that existing in the role of employer of the employee shall be relevant for consideration for purposes of this chapter, and the remedies and rights provided by this chapter shall in fact be exclusive regardless of the multiple roles, capacities, or personas the employer may be deemed to have.

(b)(1) However, if an employer fails to secure the payment of compensation as required by this chapter, an injured employee, or his or her legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter or to maintain a legal action in court for damages on account of the injury or death.

(2) In such action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant-employer plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of his or her employment, or that the injury was due to the contributory negligence of the employee.

History. Init. Meas. 1948, No. 4, § 4, Acts 1949, p. 1420; Acts 1979, No. 253, § 1; A.S.A. 1947, § 81-1304; Acts 1993, No. 796, § 4.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of

2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Cross References. Third party liability, § 11-9-410.

RESEARCH REFERENCES

ALR. Negligent spoliation of evidence, interfering with prospective civil action, as actionable. 101 A.L.R.5th 61.

Contractual waiver of exclusivity of workers' compensation remedy. 117 A.L.R.5th 441.

Postaccident conduct by employer, employer's insurer, or employer's employees in relation to workers' compensation claim as waiving, or estopping employer from asserting, exclusivity otherwise afforded by workers' compensation statute. 120 A.L.R.5th 513.

Right to workers' compensation for injury suffered at worker's home where home is claimed as "work situs." 4 A.L.R.6th 57.

Construction and Application of Exclusive Remedy Rule Under State Workers' Compensation Statutes with Respect to Liability for Injury or Death of Employee as Passenger in Employer-Provided Vehicle — Requisites for, and Factors Affecting, Applicability and Who May Invoke Rule. 42 A.L.R.6th 545.

Construction and Application of Exclusive Remedy Rule under State Workers' Compensation Statute With Respect to Liability for Injury or Death of Employee as Passenger in Employer-Provided Vehicle — Against Whom May Rule Be Invoked and Application of Rule to Particular Situations and Employees. 43 A.L.R.6th 375.

Exclusive Remedy Provision of State Workers' Compensation Statute as Applied to Injuries Sustained During or as the Result of Horseplay, Joking, Fooling, or the Like. 44 A.L.R.6th 545.

Ark. L. Rev. Workmen's Compensation — Contribution and Indemnity — Em-

ployer's Liability to Third Party Tortfeasor, 8 Ark. L. Rev. 512.

Comparative Negligence, 9 Ark. L. Rev. 357.

Workmen's Compensation — Third Party's Right to Indemnification — Absence of Express Indemnity Agreement, 16 Ark. L. Rev. 315.

Workmen's Compensation — Common Law Tort Liability of Principal Contractor to Employees of Sub-Contractor, 17 Ark. L. Rev. 213.

Note, Wal-Mart Stores, Inc. v. Bay-singer: Retaliatory Discharge in Arkansas Workers' Compensation Cases, 45 Ark. L. Rev. 939.

Copeland, The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?, 47 Ark. L. Rev. 1.

Flavio Rios Guerrero v. OK Foods, Inc.: Advocating for a Broader Intentional-Tort Exception to the Workers' Compensation Exclusive-Remedy Doctrine, 61 Ark. L. Rev. 133.

U. Ark. Little Rock L.J. Note: Wallis v. Mrs. Smith's Pie Co., 1 U. Ark. Little Rock L.J. 103.

Survey of Arkansas Law: Worker's Compensation, 4 U. Ark. Little Rock L.J. 255.

Notes, Workers' Compensation — Supervisory Employees Are Immune From Tort Actions, 8 U. Ark. Little Rock L.J. 523.

Lucy, Workers' Compensation Law: Act 797 of 1993 and the Definition of "Compensable Injury," 20 U. Ark. Little Rock L.J. 265.

Annual Survey of Caselaw, Tort Law, 26 U. Ark. Little Rock L. Rev. 985.

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Constitutionality.

This section is not unconstitutional nor was it unconstitutionally applied to bar claim of employer against insurer alleging fraudulent conduct. *Seawright v. United States Fid. & Guar. Co.*, 275 Ark. 96, 627 S.W.2d 557 (1982).

Subsection (a) was unconstitutional, as amended in 1993, as it granted tort immunity to a prime contractor, even when there was no statutory employment relationship with the injured employee. *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (Ark. 1998).

In General.

Where an action involves both the Uniform Contribution among Tortfeasors Act, § 16-61-201 et seq., and this chapter, it is in the interest of public policy and in keeping with the intent of the General Assembly to give this chapter priority as an exclusive remedy. *W.M. Bashlin Co. v.*

Smith, 277 Ark. 406, 643 S.W.2d 526 (1982), superseded by statute as stated in, *Billings v. Aeropres Corp.*, 522 F. Supp. 2d 1121 (E.D. Ark. 2007).

This section does not allow a claimant to maintain a personal injury suit for damages when his employer, by disputing the claim, fails to secure worker's compensation payment for the claimant. *Rankin v. Farmers Tractor & Equip. Co.*, 319 Ark. 26, 888 S.W.2d 657 (1994).

Purpose.

The purpose of workers' compensation statutes was to change the common law by shifting the burden of all work-related injuries from individual employers and employees to the consuming public. *Simmons First Nat'l Bank v. Thompson*, 285 Ark. 275, 686 S.W.2d 415 (1985).

Applicability.

The exclusive remedy provided by this section applies to a worker injured by the active negligence of a non-supervisory co-employee. *Brown v. Finney*, 326 Ark. 691, 932 S.W.2d 769 (1996).

Administrator's wrongful death suit against decedent's employer and insurance carrier was properly dismissed on the grounds of the exclusive remedy provision of this section; administrator's argument that the claim did not sound in tort but on an indemnity contract between the employer and the city was without merit because the administrator was merely an incidental, not intended, third party beneficiary. *Cherry v. Tanda, Inc.*, 327 Ark. 600, 940 S.W.2d 457 (1997).

Where Arkansas' workers' compensation law provided that an injured employee who did not receive the necessary benefits was allowed to file a workers' compensation claim or file a complaint in circuit court, the Arkansas rule of law was better than the Louisiana rule of law, which would have prevented the injured person's negligence suit against a non-employer corporation, thereby foreclosing the injured person's day in court; thus, the Arkansas rule applied despite the fact that the accident itself occurred in Louisiana. *Schubert v. Target Stores, Inc.*, 360 Ark. 404, 201 S.W.3d 917 (2005), appeal dismissed, 2009 Ark. 89, 302 S.W.3d 33 (2009).

Section 16-55-202 is not an unconstitutional intrusion on the rule-making authority of the Supreme Court of Arkansas, it must be interpreted based on its plain terms, and it clearly allows juries to consider the fault of employers and other non-parties in tort suits, including products liability suit, without restriction and regardless of whether the employer or non-party could be directly joined in the suit. The fact that an employer may be protected from being sued under the Arkansas' Workers' Compensation Act, based on its payment of workers' compensation and medical benefits to an injured worker, does not preclude a jury from considering whether the employer is at fault or is partially at fault for the accident giving rise to the worker's injuries because a finding of fault pursuant to § 16-55-202 does not render the employer subject to any liability for its fault. *Bohannon v. Johnson Food Equip., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 45273 (E.D. Ark. June 9, 2008).

Motion to strike the notice of intent to assert non-party fault, which was filed by defendants who were sued by an injured worker in a products liability suit, was denied. By its plain terms, § 16-55-202 allowed defendants to request that the jury to consider the fault of the worker's employer and a non-party manufacturer of a component used in the chicken processing machine that was the focus of the suit, and it did not matter that the employer could not be directly sued in the suit, based on the exclusivity provision of Arkansas' Workers' Compensation Act, or that the manufacturer had not been made a party in the suit or served under Ark. R. Civ. P. 4, as no liability would be imposed, even if the jury found the employer or the manufacturer to be at fault pursuant to § 16-55-202. *Bohannon v. Johnson Food Equip., Inc.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 45273 (E.D. Ark. June 9, 2008).

Action by Legal Representative.

Administrator's argument that estate was entitled to recover for breach of implied contractual duty to supply a safe work place was contrary to plain meaning of this section. *Cherry v. Tanda, Inc.*, 327 Ark. 600, 940 S.W.2d 457 (1997).

Action by Spouse.

Exclusive remedy provision did not apply to widow's claims of misrepresentation

and extreme mental anguish; her alleged injuries were not the result of an aggravation of the initial, compensable injury suffered by her husband, and this chapter did not provide a remedy for her injuries. *Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997).

Because spouse's action for emotional distress was one manifestly premised on a nonphysical injury, and because her injury was not compensable and beyond the scope of coverage of this chapter, the claim was not barred by the exclusive-remedy provision of this chapter. *Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997).

Contributory Negligence.

An employee's contributory negligence does not prevent application of a penalty against the employer under § 11-9-503 for violating safety provisions. *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

Discrimination.

There is no remedy under this chapter for an employee who is terminated from his or her job on the basis of a disability after the end of the rehabilitation and compensation period; thus, the exclusive-remedy provision of this chapter does not preclude an employee from bringing an action under the Arkansas Civil Rights Act, § 16-123-101 et seq., based upon employer's alleged discrimination in terminating her on the basis of her permanent restrictions and impairments. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

Election of Remedies.

Acceptance of settlement for all claims arising pursuant to this chapter barred a subsequent tort claim against the employer under the common law. *Sontag v. Orbit Valve Co.*, 283 Ark. 191, 672 S.W.2d 50 (1984).

Where there was no final determination whether the Workers' Compensation Law applied to the injury in question, the court declined to hold that employee had made an election such that he was barred from any of the relief he had sought in the event it was ultimately determined that his injury was not job-related and thus not covered by the Workers' Compensation Law. *Riverside Furn. Corp. v. Rogers*, 295 Ark. 452, 749 S.W.2d 664 (1988).

An employee who files for workers' compensation may still bring a civil cause of action, for the public policy exception comprehends conduct by the employer which contravenes the statute, § 11-9-107, and the stated objectives of the Workers' Compensation Act. *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991), superseded by statute as stated in, *Pedigo v. P.A.M. Transp., Inc.*, 891 F. Supp. 482 (W.D. Ark. 1994), superseded by statute as stated in, *Stanton v. Larry Fowler Trucking, Inc.*, 52 F.3d 723 (8th Cir. 1995), superseded by statute as stated in, *Trotter v. Weyerhaeuser Corp.*, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 42099 (W.D. Ark. May 18, 2009).

When an employee is able to show actual, specific and deliberate intent by the employer to injure him, he may avoid the exclusive remedy provisions and proceed in a common-law tort action, i.e., the employee has the option to pursue his claim for damages either in tort or under this chapter; however, once the employee makes that election, the employee may not later avail himself of the remedy not chosen. *Western Waste Indus. v. Purifoy*, 326 Ark. 256, 930 S.W.2d 348 (1996).

Where employee settled a claim with the employer before the Commission, and discharged employer's liability for any past or future injuries, the trial court had no jurisdiction to proceed on employee's later intentional tort claims in circuit court, since those claims were properly concluded before the Commission. *Western Waste Indus. v. Purifoy*, 326 Ark. 256, 930 S.W.2d 348 (1996).

A teacher's claim against the school district which employed her for the intentional tort of outrage was barred by the doctrine of election of remedies where she had previously pursued worker's compensation benefits based on the same injuries. *Gourley v. Crossett Pub. Sch.*, 333 Ark. 178, 968 S.W.2d 56 (1998).

Workers' claim for compensation benefits was barred under the election of remedies doctrine where it was clear that the worker actively initiated and participated in the proceedings in Illinois by signing papers sent to him by his Illinois counsel and agreeing to the filing of his claim in Illinois, and that he knowingly received benefits pursuant to this award. *Elliot v. Maverick Transp.*, 87 Ark. App. 118, 189 S.W.3d 62 (2004).

To maintain a suit in tort contemplated by subsection (b) of this section, a plaintiff must prove negligence on the part of the defendant. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

Subsection (b) of this section penalizes employers without subjecting them to strict liability. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

Although an injured worker alleged that a healthcare company was a prime contractor for purposes of § 11-9-402(a), such a finding by the court would have afforded him no relief since he had elected to sue in tort under subsection (b) of this section, and § 11-9-402(a), which made a prime contractor liable for compensation to employees of subcontractors who failed to secure compensation, was a workers' compensation statute that governed claims filed with the Arkansas Workers' Compensation Commission. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

Mere fact of a freight lessor's, a freight carrier's, and a healthcare company's non-compliance with § 11-9-404, in failing to secure the payment of workers' compensation, did not establish their negligence for purposes of subsection (b) of this section, because an injured truck driver, who sought damages for a work-related back injury, did not demonstrate that their failure to maintain insurance coverage caused his injury. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

In order to establish liability on the part of a freight lessor, a freight carrier, and a healthcare company under subsection (b) of this section, a truck driver, who injured his back while disconnecting a trailer from his truck, was required to demonstrate negligence on their part since, under the plain meaning of subsection (b), the no-fault theory of workers' compensation did not carry over to suits filed in tort. The statute did not state that suits filed in tort were to be based on a theory of strict liability, and under the rule of strict construction, no such intent could be inferred. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

Employees.

As supervisory employees, defendants in a personal injury and wrongful death action arising out of an industrial accident are protected from personal liability by

the same immunity that § 11-9-105 confers upon the employer itself, the remedies provided being exclusive. *Simmons First Nat'l Bank v. Thompson*, 285 Ark. 275, 686 S.W.2d 415 (1985).

Employment Services.

There was no err in finding that the decedent's death was compensable under workers' compensation, because it was undisputed that the decedent was within the time and space boundaries of his employment, and finished with his break and en route to receive further instructions, which constituted performance of employment services. *Mitchell v. Tyson Poultry, Inc.*, 104 Ark. App. 327, 292 S.W.3d 848 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 723 (Mar. 18, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 483 (June 4, 2009).

Exclusivity.

Workers' compensation laws held to provide exclusive remedy in the following cases: *Young v. G.L. Tarlton, Contractor*, 204 Ark. 283, 162 S.W.2d 477 (1942); *Hagger v. Wortz Biscuit Co.*, 210 Ark. 318, 196 S.W.2d 1 (1946); *Barth v. Liberty Mut. Ins. Co.*, 212 Ark. 942, 208 S.W.2d 455 (1948); *Kimpel v. Garland Anthony Lumber Co.*, 216 Ark. 788, 227 S.W.2d 932 (1950) (previous decisions under prior law); *Huffstettler v. Lion Oil Co.*, 110 F. Supp. 222 (W.D. Ark. 1953), *aff'd*, 208 F.2d 549 (8th Cir. Ark. 1953); *Brown v. W.H. Patterson Constr. Co.*, 235 Ark. 465, 361 S.W.2d 13 (1962); *Horne v. Security Mut. Cas. Co.*, 265 F. Supp. 379 (E.D. Ark. 1967); *Ellington v. Hartford Steam Boiler Inspection & Ins. Co.*, 53 F.R.D. 280 (W.D. Ark. 1971); *Johnson v. Houston Gen. Ins. Co.*, 259 Ark. 724, 536 S.W.2d 121 (1976); *Griffin v. George's, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979); *Moss v. Southern Excavation, Inc.*, 271 Ark. 781, 611 S.W.2d 178 (1981); *Woodell v. Brown & Root, Inc.*, 2 Ark. App. 106, 616 S.W.2d 781 (1981); *Seawright v. United States Fid. & Guar. Co.*, 275 Ark. 96, 627 S.W.2d 557 (1982); *Daniels v. Commercial Union Ins. Co.*, 5 Ark. App. 142, 633 S.W.2d 396 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983), *aff'd*, 728 F.2d 1129 (8th Cir. Ark. 1984).

For defendant company to defend negligence action on the ground that this chap-

ter provided the exclusive remedy, it was required to prove that plaintiff was its employee and that it had secured payment as required by § 11-9-404; plaintiff was not required to prove that he was not company employee. *French v. Grove Mfg. Co.*, 656 F.2d 295 (8th Cir. 1981).

An employer who is covered under this chapter cannot be sued in tort. *Daniels v. Commercial Union Ins. Co.*, 5 Ark. App. 142, 633 S.W.2d 396 (1982).

As supervisory employees, the defendants in a personal injury and wrongful death action arising out of an industrial accident were protected from personal liability by the same immunity that the statute confers upon the employer itself, the remedies provided by the statute being exclusive. *Simmons First Nat'l Bank v. Thompson*, 285 Ark. 275, 686 S.W.2d 415 (1985).

Where the employee was required to do the same work with the same exposure after he was injured the first time, the only remedies available to the employee were those pursuant to the Workers' Compensation Act, since the employer's actions were not of such magnitude as to constitute an intentional tort and thereby removed the employer from the protection of the act. *White v. Apollo-Lakewood, Inc.*, 290 Ark. 421, 720 S.W.2d 702 (1986).

Subject to a few narrow exceptions, an employer is immune from liability for damages in a tort action brought by an injured employee. *Fore v. Circuit Court*, 292 Ark. 13, 727 S.W.2d 840 (1987), overruled in part, *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (Ark. 1993), overruled, *Wise Co. v. Clay Circuit*, 315 Ark. 333, 869 S.W.2d 6 (Ark. 1993), overruled in part, *Wise Co. v. Clay Circuit*, 315 Ark. 336A, — S.W.2d — (1994).

Writ of prohibition by Supreme Court preventing trial court from proceeding with tort action brought by injured employee against employee's supervisor was proper where the actions of the supervisor, who was acting within the scope of his supervisory duties during the course of his employment, were neither willful nor intentional, and thus workers' compensation laws were exclusive remedy. *Fore v. Circuit Court*, 292 Ark. 13, 727 S.W.2d 840 (1987), overruled in part, *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (Ark. 1993), overruled, *Wise Co. v. Clay Circuit*, 315 Ark. 333, 869 S.W.2d 6 (Ark.

1993), overruled in part, *Wise Co. v. Clay Circuit*, 315 Ark. 336A, — S.W.2d — (1994).

The benefits payable pursuant to the Workers' Compensation Act, and the procedure set out in that act for obtaining those benefits, constitutes an exclusive remedy. *Roy Horton Tomato Co. v. Home Ins. Co.*, 683 F. Supp. 714 (E.D. Ark. 1988); *Smith v. Rockwood Ins. Co.*, 684 F. Supp. 607 (E.D. Ark. 1988).

One consequence flowing from the exclusive nature of the Workers' Compensation Act is that the remedy precludes an action at law, including an intentional tort arising out of the nonpayment of benefits. *Roy Horton Tomato Co. v. Home Ins. Co.*, 683 F. Supp. 714 (E.D. Ark. 1988); *Smith v. Rockwood Ins. Co.*, 684 F. Supp. 607 (E.D. Ark. 1988).

The exclusive language of the Workers' Compensation Act does not preclude an Arkansas court from recognizing legal obligations owed by employers to their employees when acting in distinctly different legal roles than that of employer. *Estate of Blakely v. Asbestos Corp.*, 766 F. Supp. 721 (E.D. Ark. 1991).

This section is the exclusive remedy of an employee injured in the course of his employment and makes no exceptions for contract actions. *Gullett v. Brown*, 307 Ark. 385, 820 S.W.2d 457 (1991).

The exclusive remedy provision of this section does not bar an employee from being legally entitled to recover under § 23-89-209, the underinsured motorist statute, against a coemployee who was the owner or operator of the vehicle in which the employee was riding at the time of the injury. *Southern Farm Bureau Cas. Ins. Co. v. Pettie*, 54 Ark. App. 79, 924 S.W.2d 828 (1996).

Summary judgment in favor of company was improper because the determination of whether the company was a stockholder-employer within the meaning of subsection (a) of this section was exclusively with the Arkansas Workers' Compensation Commission. *Stocks v. Affiliated Foods Southwest, Inc.*, 363 Ark. 235, 213 S.W.3d 3 (2005).

Appellate court affirmed summary judgment in favor of employer after employee lost his arm during a work-related accident because the exclusivity provisions of this section applied; the intentional-tort exception did not apply. *Guerrero v. Ok*

Foods, Inc., 94 Ark. App. 333, 230 S.W.3d 296 (2006).

Grant of summary judgment in favor of company and its owner in individual's product liability action against the company for injuries she sustained while working on a production line for the company was reversed as the Arkansas Workers' Compensation Commission had exclusive jurisdiction to resolve the matter. *Moses v. Hanna's Candle Co.*, 366 Ark. 233, 234 S.W.3d 872 (2006).

Court granted a writ of prohibition preventing a circuit court from exercising jurisdiction over a husband's action against an employer arising out of the death of his wife while she was working for the employer because at the point in the litigation, the circuit court was wholly without jurisdiction over the claims as under Arkansas Workers' Compensation Act, §§ 11-9-101 — 1001, the claims were within the exclusive jurisdiction of the Arkansas Workers' Compensation Commission. *Int'l Paper Co. v. Clark Co. Cir. Ct.*, 375 Ark. 127, 289 S.W.3d 103 (2008).

Co-employees' appeal of an order dismissing their action against a pilot to recover damages for injuries they sustained from a medical-helicopter crash was dismissed because the circuit court lacked jurisdiction to determine whether the co-employees' injuries were covered under Workers' Compensation Act, and although the co-employees were arguing that the pilot was a third person who did not enjoy immunity under the Act, the Workers' Compensation Commission had exclusive original jurisdiction to determine that issue; when a party to a lawsuit raises a question of whether a person enjoys immunity as an employer under the Act, the Commission must first decide the issue. *Miller v. Enders*, 2010 Ark. 92, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 187 (Apr. 1, 2010).

Substantial evidence supported the Arkansas Workers' Compensation Commission's finding that a pilot was an employer of a decedent for purposes of this section as: (1) the parties stipulated that the pilot was president of the decedent's employer, a member of its board of directors, a major stockholder, and its sales manager; (2) the pilot took an active role in the management and personnel decisions of the company, and was the decedent's sales super-

visor; and (3) the company was family-owned and operated. *Honeysuckle v. Curtis H. Stout, Inc.*, 2010 Ark. 328, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 500 (Oct. 28, 2010).

Arkansas Workers' Compensation Act, § 11-9-101 et seq., including the exclusive-remedy provision of subsection (a) of this section, is made possible by Ark. Const. Amend. 26, which amended Ark. Const. Art. V, § 32; that amendment provides that the Arkansas general assembly has the power to enact legislation prescribing the amount of compensation employers are required to pay for injuries or deaths of employees. *Honeysuckle v. Curtis H. Stout, Inc.*, 2010 Ark. 328, — S.W.3d — (2010), rehearing denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 500 (Oct. 28, 2010).

This section of the Work Near High Voltage Lines Act (Act) had priority over the exclusive remedy provisions of Worker's Compensation Act. Thus, an employer had to indemnify a utility for attorney's fees it incurred in defending personal injury actions as a result of the employer's failure to comply with the notification provisions of the Act. *Intents, Inc. v. Southwestern Elec. Power Co.*, 2011 Ark. 32, — S.W.3d — (2011).

Foreign Awards.

Complete double recovery under the workers' compensation acts of two states is not permitted on the strength of the discredited analogy of recovering on two private contracts of accident insurance. *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961).

Employee receiving salary from employer in Arkansas and another state entitled to weekly payments for loss of salary in both states but not entitled to two awards for hospital and medical expenses. *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961).

Payments of maximum benefits under the compensation law of one state does not bar an employee from asserting a subsequent claim under the law of a sister state unless the law of the first state so prohibits, but there can be no double recovery, only the difference by which the second award is greater than the first may be recovered. *Missouri City Stone, Inc. v. Peters*, 257 Ark. 917, 521 S.W.2d 58 (1975).

Proceedings before the Arkansas Workers' Compensation Commission and a workers' compensation claim in Oklahoma are not mutually exclusive, but all states having a legitimate interest in an injury have the right to apply their own rules and standards, either separately, simultaneously or successively. *Robinson v. Ed Williams Constr. Co.*, 38 Ark. App. 90, 828 S.W.2d 860 (1992).

Immunity.

Insurer and safety consultant were not immune under the exclusive remedy provision of this section because they were "third parties" as defined by § 11-9-410. *Wilson v. Rebsamen Ins., Inc.*, 330 Ark. 687, 957 S.W.2d 678 (1997).

Immunity under this section has been extended only in two instances: (1) to the employer's workers' compensation carrier; and (2) to co-employees who were performing the employer's duty to provide a safe work place at the time of the injury. *Wilson v. Rebsamen Ins., Inc.*, 330 Ark. 687, 957 S.W.2d 678 (1997).

Appellate court granted individual's writ of prohibition asserting that respondent Pulaski County Circuit Court was without jurisdiction to proceed in a case where individual alleged that he enjoyed immunity from suit as an employer under the Arkansas Workers' Compensation Act. *McCarthy v. Pulaski County Circuit Court*, 366 Ark. 316, 235 S.W.3d 497 (2006).

Civil Justice Reform Act, § 16-55-201 et seq., can not be interpreted to permit a jury to apportion fault in a tort suit to an immune non-party employer because doing so would render the statute unconstitutional. Such an interpretation would violate the employer's fundamental constitutional rights because subsection (a) of this section, the exclusivity provision of the Arkansas Workers' Compensation Act, § 11-9-101 et seq., deprives courts of subject matter jurisdiction over employers, thereby protecting employers from compulsory process, and it also provides immunity to employers with regard to claims arising from a covered worker's employment-related injuries. *Billings v. Aeropres Corp.*, 522 F. Supp. 2d 1121 (E.D. Ark. 2007).

While a products liability defendant could issue a non-party notice under § 16-55-202(b)(2) with regard to a non-party

equipment manufacturer, it could not issue a § 16-55-202(b)(2) apportionment of damages notice with regard to an injured worker's employer and co-employee: (1) the purpose of the notice under § 16-55-202 was to allow an apportionment of liability with regard to the injured worker's damages; (2) a § 16-55-202 notice could only be used with regard to an individual or entity that could be made a party to the suit by way of cross or third party claims; and (3) defendant could not file a § 16-55-202 notice against the employer or the co-employee because they were statutorily immune pursuant to subsection (a) of this section, the exclusive remedies provision of the Workers' Compensation Act, § 11-9-101 et seq. *Billings v. Aeropres Corp.*, 522 F. Supp. 2d 1121 (E.D. Ark. 2007).

Section 16-55-202 should be interpreted as being compatible with § 16-64-122(a), which limits the apportionment of fault to an individual or entity from whom the claiming party seeks to recover damages, which includes individuals and entities that are subject to being brought into a suit pursuant to a cross or third party claim under Ark. R. Civ. P. 13 and 14, but excludes non-parties who are otherwise immune from suit. Employers have immunity under subsection (a) of this section, the exclusive remedies provision of the Workers' Compensation Act, § 11-9-101 et seq., with regard to claims arising from employment-related injuries sustained by covered workers. *Billings v. Aeropres Corp.*, 522 F. Supp. 2d 1121 (E.D. Ark. 2007).

Arkansas Workers' Compensation Commission erred in concluding that it had jurisdiction over an employee's tort claims against a corporation and its owner, and in deciding that the corporation and owner were immune under subsection (a) of this section because there was no employment relationship between the employee and the corporation and owner. *Johnson v. Ark. Steel Erectors*, 2009 Ark. App. 755, 350 S.W.3d 801 (2009).

Indemnity.

Utility company was entitled to sue contractor on indemnity agreement by virtue of judgment taken against utility company by employee of contractor for injuries sustained even though it had not made contractor a party to damage suit by

employee, since liability of contractor to employee was limited to payment of compensation. *C & L Rural Elec. Coop. Corp. v. Kincaid*, 221 Ark. 450, 256 S.W.2d 337 (1953).

An employer who has paid Workers' Compensation benefits to an employee must indemnify a third person held liable for the employee's injury where, as between the third person and the employer, the injury was the fault of the employer. *Fidelity & Cas. Co. v. J.A. Jones Constr. Co.*, 200 F. Supp. 264 (E.D. Ark. 1961), aff'd, 325 F.2d 605 (8th Cir. Ark. 1963).

Architects' insurer could not obtain indemnity from employer of workmen for damage judgments paid to workmen for injuries, since under this section the workmen would have had no right of tort action against employer. *Fidelity & Casualty Co. v. J. A. Jones Constr. Co.*, 325 F.2d 605 (8th Cir. Ark. 1963).

Where Workers' Compensation insurance company paid benefits and sought subrogation claim against liability carrier, liability carrier was not entitled to assert a claim against employer on the ground that the employer was negligent or assert a claim for contribution or indemnity. *Ellington v. Hartford Steam Boiler Inspection & Ins. Co.*, 53 F.R.D. 280 (W.D. Ark. 1971).

Cross-complaint against employer should not have been dismissed on ground that remedy was limited by this section where it stated a cause of action for implied indemnity. *Oaklawn Jockey Club, Inc. v. Pickens-Bond Constr. Co.*, 251 Ark. 1100, 477 S.W.2d 477 (1972).

In absence of a contract for indemnity running in favor of the third party, a negligent third party tortfeasor is not entitled to either indemnity or contribution from a negligent employer where their concurrent negligence has produced the injury or death of the employee. *Dulin v. Circle F Indus., Inc.*, 558 F.2d 456 (8th Cir. 1977).

A third party will have indemnity from a negligent employer where the liability that has been imposed upon the third party is purely vicarious and without fault on his part. *Dulin v. Circle F Indus., Inc.*, 558 F.2d 456 (8th Cir. 1977).

Evidence was sufficient to find an implied promise that the employer would indemnify third party for any damages he is made to pay as a result of the employ-

er's negligence. *Smith v. Paragould Light & Water Comm'n*, 303 Ark. 109, 793 S.W.2d 341 (1990).

There exists an exception to the exclusivity of the workers' compensation remedy when there is a contract or special relation capable of carrying with it an implied obligation to indemnify running from the employer to a third party; however, the exception does not extend to a fully executed sales contract, in which implied duties or warranties do not run from the purchaser (employer) to manufacturer, but from the manufacturer to the purchaser. To find that when a purchaser buys a product, he makes an implied contract with the manufacturer to use that product in such a way as not to bring liability upon the manufacturer would be stretching the concept of contract out of all relation to reality. *Mosley Mach. Co. v. Gray Supply Co.*, 310 Ark. 214, 833 S.W.2d 772 (1992).

The mere acknowledgement of the employer's duty to maintain and operate a machine in a safe manner and to comply with Occupational Safety and Health Act regulations does not express an agreement of indemnity running to the manufacturer so as to constitute an exception to the exclusivity of the Workers' Compensation Law. *Mosley Mach. Co. v. Gray Supply Co.*, 310 Ark. 214, 833 S.W.2d 772 (1992).

Insurance Carrier.

Workers' compensation insurance carrier has same immunity from suit by an injured employee as is provided employer. *Burkett v. PPG Indus., Inc.*, 294 Ark. 50, 740 S.W.2d 621 (1987); *Cherry v. Tanda, Inc.*, 327 Ark. 600, 940 S.W.2d 457 (1997).

Intent.

Where employer willfully assaulted employee, the fact that employee might have recovered under this chapter did not bar employee's action for damages. *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950).

In order to avoid the bar of this section, complaint must allege intentional or deliberate act by employer with a desire to bring about the consequences of the act and not willful and wanton conduct by negligent direction to the employee to use a device known by the employer to be defective or failure to warn the employee

of an unsafe condition of which the employer was aware. *Griffin v. George's, Inc.*, 267 Ark. 91, 589 S.W.2d 24 (1979).

If an employer commits acts with an actual, specific, and deliberate intent to injure the employee, the employee may pursue a common-law action in tort. *Phifer v. Union Carbide Corp.*, 492 F. Supp. 483 (E.D. Ark. 1980); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983), *aff'd*, 728 F.2d 1129 (8th Cir. Ark. 1984); *Sontag v. Orbit Valve Co.*, 283 Ark. 191, 672 S.W.2d 50 (1984).

Injured employees did not allege the type of intent necessary to trigger the exception to the exclusivity provision of this section. *Pyle v. Dow Chemical Co.*, 728 F.2d 1129 (8th Cir. Ark. 1984).

Whenever an employee is injured by the willful and malicious acts of his employer he may treat the acts of the employer as a breach of the employer-employee relationship and seek full damages in a common-law action; however, he must elect one remedy or the other. *Sontag v. Orbit Valve Co.*, 283 Ark. 191, 672 S.W.2d 50 (1984).

Failure to warn of dangers or failure to provide safe conditions, deliberately placing an employee in a dangerous position and willfully violating governmental regulations does not bring the cause of action within the ambit of an intentional tort. That type of activity by an employer, even where flagrant, does not constitute an intentional tort for purposes of the exclusivity provision of this chapter. *Miller v. Ensco, Inc.*, 286 Ark. 458, 692 S.W.2d 615 (1985).

While it is true that the intentional infliction of an injury upon an employee by an employer is an exception to the exclusive remedy provision of this chapter, that exception is not created by the bare allegation that the employee's injury was the result of willful and wanton conduct by the employer; in order to escape the application of subsection (a), the complaint must allege a deliberate act by the employer with a desire to bring about the consequences of the act. *Hill v. Patterson*, 313 Ark. 322, 855 S.W.2d 297 (1993).

Even if employer's behavior of exposing employee to asbestos fibers was intentional, it was not enough to escape the exclusivity provision in subsection (a). *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997).

Jurisdiction.

Federal District court did not have jurisdiction of diversity action for damages by employee against employer, a self-insurer under this chapter based on injuries sustained in course of employment, since remedy under this chapter was exclusive. *Shultz v. Lion Oil Co.*, 106 F. Supp. 119 (W.D. Ark. 1952), appeal dismissed, 202 F.2d 752 (8th Cir. Ark. 1953).

Where the reformation action under this chapter was primarily an action for the reformation of an insurance policy, no action before the Workers' Compensation Commission could be maintained until the reformation was attained; deceased's administratrix was the proper party to bring the action for reformation, and the chancery court was the proper forum. *American Cas. Co. v. Hambleton*, 233 Ark. 942, 349 S.W.2d 664 (1961).

Any claim that employee has against employer, employer's Workers' Compensation insurance carrier, or agent of carrier must be determined by a proceeding before the Workers' Compensation Commission. *Ragsdale v. Watson*, 201 F. Supp. 495 (W.D. Ark. 1962).

Workers' Compensation Commission did not have exclusive jurisdiction where decedent was alleged to have been an independent contractor. *Co-Ark. Const. Co. v. Amsler*, 234 Ark. 200, 352 S.W.2d 74 (1961).

The first jurisdictional fact that had to be established was that the claimant or decedent was in fact and in law an employee of the person against whom the claim was asserted. *Eagle Star Ins. Co. v. Deal*, 337 F. Supp. 1264 (W.D. Ark. 1972), rev'd, 474 F.2d 1216 (8th Cir. 1973).

Federal district courts, like state courts, have no subject-matter jurisdiction in cases in which exclusive jurisdiction is vested in the Workers' Compensation Commission. *Phifer v. Union Carbide Corp.*, 492 F. Supp. 483 (E.D. Ark. 1980).

The Workers' Compensation Commission has jurisdiction to determine questions concerning an employer's insurance policy, including the extent of coverage, when they are ancillary to a determination of the claimant's rights. In resolving questions concerning the extent of coverage, the commission has authority to pass upon issues involving fraud in procurement, mistake of the parties, reformation of the policy, cancellation, existence or

validity of an insurance contract, coverage of the policy at the time of injury, and construction of extent of coverage. *Roy Horton Tomato Co. v. Home Ins. Co.*, 683 F. Supp. 714 (E.D. Ark. 1988).

The contention by a workers' compensation insurance carrier that an employee was not acting within the course and scope of employment when his injury occurred was one that was required to be made before the Workers' Compensation Commission because of the exclusive remedy provisions of this section. *Zenith Ins. Co. v. VNE, Inc.*, 61 Ark. App. 165, 965 S.W.2d 805 (1998).

The exclusive remedy of an employee or her representative on account of injury or death arising out of and in the course of her employment is a claim for compensation under this chapter, and the commission has exclusive, original jurisdiction to determine the facts that establish jurisdiction, unless the facts are so one-sided that the issue is no longer one of fact but one of law, such as an intentional tort. *VanWagoner v. Beverly Enters.*, 334 Ark. 12, 970 S.W.2d 810 (Ark. 1998).

Circuit court erred by granting summary judgment in a negligence case against a contractor based on lack of supervision and control because the circuit court did not have jurisdiction to determine if the Arkansas Workers' Compensation Act applied to the case; evidence regarding the relationship between two companies was insufficient to show that the Act did not apply as a matter of law. *Merez v. Squire Court Ltd. P'ship.*, 353 Ark. 174, 114 S.W.3d 184 (2003).

Circuit court lacked jurisdiction to determine whether employees' alleged asbestos exposure injuries were covered under the Workers' Compensation Act and whether the claims against the employer were barred by the exclusive remedy provision of this section; exclusive jurisdiction of the matter was with the Workers' Compensation Commission because the facts presented were not so one-sided so as to demonstrate that the Act did not apply as a matter of law. *Carter v. Georgia-Pacific Resins, Inc.*, 368 Ark. 19, 242 S.W.3d 616 (2006).

Prime Contractor.

The term "prime contractor" in subsection (a) presupposes work to be done for a third party. *Nucor Holding Corp. v. Rinkines*, 326 Ark. 217, 931 S.W.2d 426 (1996).

By amending this section in 1993, the General Assembly clearly intended to extend tort immunity to a prime contractor regardless of whether the subcontractor had paid workers' compensation benefits to its injured employee. *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (Ark. 1998).

Sexual Harassment.

Under Arkansas law sexual harassment is not a risk to which an employee is exposed because of the nature of the employment but is a risk to which the employee could be equally exposed outside employment, therefore, such claim is neither covered nor barred by the Workers' Compensation Act. *King v. Consolidated Freightways Corp.*, 763 F. Supp. 1014 (W.D. Ark. 1991).

Special Employer.

Nothing in this chapter reflects that its exclusivity provision is not applicable to a "special employer," since a special employer might well be liable for worker's compensation claims if the employee has made a contract for hire, express or implied, with the special employer, the work being done is essentially that of the special employer, and the special employer has the right to control the details of the work. *National Union Fire Ins. v. Tri-State Iron & Metal*, 323 Ark. 258, 914 S.W.2d 301 (1996).

A special employer falls within the exclusivity provision of this chapter, and neither a negligence nor contract action can be filed against special employer by claimant or insurance carrier for general employer as a subrogee because the exclusivity provision makes no exceptions for contract actions. *National Union Fire Ins. v. Tri-State Iron & Metal*, 323 Ark. 258, 914 S.W.2d 301 (1996).

Subrogation.

A workers' compensation insurance carrier could not, as subrogee of an injured employee, sue the sole owner and officer of the employer as a third person for injuries sustained by the employee in the crash of an airplane piloted by the owner/officer. *Zenith Ins. Co. v. VNE, Inc.*, 61 Ark. App. 165, 965 S.W.2d 805 (1998).

Summary Judgment.

Where request for summary judgment, with its supporting affidavit, failed to

show that plaintiffs had remedy under this chapter, summary judgment in a suit for wrongful death was improper. *Griffin v. Monsanto Co.*, 240 Ark. 420, 400 S.W.2d 492 (1966).

Trial court erred in granting a potential employer's motion for summary judgment in a negligence action on the grounds that it did not have jurisdiction to determine if the claim was covered by the provisions of the Arkansas Workers' Compensation Act where the evidence failed to clearly show which employer an employee was working for on the date of the accident. *Johnson v. Union Pac. R.R.*, 352 Ark. 534, 104 S.W.3d 745 (2003).

Supervisory Employees.

Since an employer is immune from a cause of action based on the negligent failure to provide employees with a safe place to work, the same immunity protects supervisory employees when their general duties involve the overseeing and discharging of that same responsibility. *Lewis v. Industrial Heating & Plumbing*, 290 Ark. 291, 718 S.W.2d 941 (1986).

Liability on the basis of a willful and malicious act by an employer's supervisor will not render the employer liable to the employee in tort. *Fore v. Circuit Court*, 292 Ark. 13, 727 S.W.2d 840 (1987), overruled in part, *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (Ark. 1993), overruled, *Wise Co. v. Clay Circuit*, 315 Ark. 333, 869 S.W.2d 6 (Ark. 1993), overruled in part, *Wise Co. v. Clay Circuit*, 315 Ark. 336A, — S.W.2d — (1994).

Termination of Employment.

Where an employee has alleged two separate injuries, one being a work-related physical injury, for which she has received workers' compensation benefits, and one being a subsequent nonphysical injury arising from employer's action in terminating her based upon her physical disability as a result of the injury, the first injury is exclusively cognizable under the Workers' Compensation Act (see § 11-9-105), while the subsequent injury is of the type envisioned by the Arkansas Civil rights Act, § 16-123-101 et seq. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

Third-Party Tortfeasors.

Although under this section employer cannot rely on claims of negligence on part

of fellow employee, assumption of risk or contributory negligence, the third party tortfeasor is not deprived of the common-law defenses. *Rhoads v. Service Machine Co.*, 329 F. Supp. 367 (E.D. Ark. 1971).

Where defendant supervisor was part-owner of employer corporation, defendants in a wrongful death action could not obtain contribution from him as third party defendant because he, rather than the corporation, was regarded as the employer for the purpose of the exclusive remedy clause of this section. *Jack Morgan Constr. Co. v. Larkan*, 254 Ark. 838, 496 S.W.2d 431 (1973).

A working partner does not become a fellow employee, subject to third party liability pursuant to § 11-9-410, because of active involvement in the operations of the business. *Hill v. Patterson*, 313 Ark. 322, 855 S.W.2d 297 (1993).

Where a third party tort action was filed against a company based on the allegation that claimant was a special employee of the company, in granting a writ of prohibition, the Court implicitly held that the special employee issue was to be decided by the Arkansas Workers' Compensation Commission as it had exclusive, original jurisdiction to determine the applicability of the Arkansas Workers' Compensation Act. *Nucor Corp. v. Rhine*, 366 Ark. 550, 237 S.W.3d 52 (2006).

—Co-Workers.

This chapter does not prevent an employee, or his personal representative, from maintaining an action for negligence of a fellow employee. *King v. Cardin*, 229 Ark. 929, 319 S.W.2d 214 (1959).

Exclusive jurisdiction to entertain an employee's claim against employer for injuries caused while working as his employee rests in the Workers' Compensation Commission; no exception is made when the injury is caused by a fellow employee. *Campbell v. Waggoner*, 235 Ark. 374, 360 S.W.2d 124 (1962).

Before an action for damages may be sustained against an employer for the intentional actions of fellow employees, there must be allegations of willful and intentional acts by the employer or it must be alleged that he directed, authorized, or commanded his other employees to do the wrongful acts and the mere fact that an employer's supervisory employee injures another employee by inflicting an

intentional tort is not cause to allow such an action. *Sontag v. Orbit Valve Co.*, 283 Ark. 191, 672 S.W.2d 50 (1984).

In a case regarding a third party's liability (co-employee) for the employee's injury at work, because the co-employee was responsible for transporting the employee to and from a work site, he was involved in the employer's duty of providing the employee a safe place to work; thus, workers' compensation was the employee's exclusive remedy and the trial court did not err when it granted the co-employee's motion for summary judgment. *Gafford v. Cox*, 84 Ark. App. 57, 129 S.W.3d 296 (2003).

—Dual Capacity.

Where employer manufactured asbestos products, and such products were used in employer's plants to fireproof ceilings by an outside contractor, the court applied the dual capacity doctrine, so that the Workers' Compensation Act did not bar an employee's product liability suit since the employer owed a separate duty as a manufacturer to the employee. *Estate of Blakely v. Asbestos Corp.*, 766 F. Supp. 721 (E.D. Ark. 1991).

Under the dual persona theory, an employer may become a third person, vulnerable to tort suit, if he possesses a second persona, completely unrelated to his employer status, that could be recognized by legal standards as a separate legal person. *Thomas ex rel. City Nat'l Bank v. Valmac Indus., Inc.*, 306 Ark. 228, 812 S.W.2d 673 (1991), superseded by statute as stated in, *Stanton v. Larry Fowler Trucking, Inc.*, 52 F.3d 723 (8th Cir. 1995), superseded by statute as stated in, *Estate of Donley v. Pace Indus.*, 336 Ark. 101, 984 S.W.2d 421 (Ark. 1999).

Where plaintiff-employee had a third party claim against the tortfeasor at the time of the accident, and the tortfeasor subsequently merged with his employer, an action could be brought against his employer under the dual persona doctrine, in the employer's status as the successor corporation of the tortfeasor. *Thomas ex rel. City Nat'l Bank v. Valmac Indus., Inc.*, 306 Ark. 228, 812 S.W.2d 673 (1991), superseded by statute as stated in, *Stanton v. Larry Fowler Trucking, Inc.*, 52 F.3d 723 (8th Cir. 1995), superseded by statute as stated in, *Estate of Donley v. Pace Indus.*, 336 Ark. 101, 984 S.W.2d 421 (Ark. 1999).

After the legislature amended subsection (a) to abrogate the dual-persona exception, it would be unreasonable for the court to expand that doctrine since it was clearly defunct and unequivocally annulled. *Estate of Donley v. Pace Indus.*, 336 Ark. 101, 984 S.W.2d 421 (Ark. 1999).

Underinsured Motorist Insurance.

An action by an employee against his employer's insurance carrier for underinsured motorist benefits was not an action against the employer and, therefore, was not barred by exclusive-remedy provision of the Workers' Compensation Act. *Elam v. Hartford Fire Ins. Co.*, 344 Ark. 555, 42 S.W.3d 443 (2001).

Writ of Prohibition.

Employer's petition for a writ of prohibition was granted in a case where summary judgment, based on subsection (a) of this section, was denied in a negligence suit; whether an employer/employee relationship existed was within the jurisdiction of the Arkansas Workers' Compensation Commission, and there was no other remedy available to the employer because the denial of the motion for summary judgment was not reviewable, even after a trial on the merits. *Coonrod v. Seay*, 367 Ark. 437, 241 S.W.3d 252 (2006).

Writ of prohibition was granted because a circuit court was wholly without jurisdiction to decide whether the Arkansas Workers' Compensation Act applied since there was a conflict over the narrow exception to the exclusivity doctrine; moreover, there was no adequate remedy since

a motion for summary judgment was not subject to appeal. A motion to dismiss was treated as such since matters outside of the pleadings were considered. *Get Rid of It Arkansas, Inc. v. Hughes*, 368 Ark. 535, 247 S.W.3d 838 (2007).

Cited: *Layne-Arkansas Co. v. Henderson*, 221 Ark. 691, 255 S.W.2d 423 (1953); *Carroll v. Lanza*, 349 U.S. 408, 75 S. Ct. 804 (1955); *Carter v. Fraser Constr. Co.*, 219 F. Supp. 650 (W.D. Ark. 1963); *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969); *Ellington v. Hartford Steam Boiler Inspection & Ins. Co.*, 53 F.R.D. 280 (W.D. Ark. 1971); *Roberts v. Smith Furn. & Appliance Co.*, 263 Ark. 869, 567 S.W.2d 947 (1978); *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir. 1985); *First Nat'l Bank v. Tracor, Inc.*, 851 F.2d 212 (8th Cir. 1988); *Elk Corp. of Arkansas v. Builders Transport, Inc.*, 862 F.2d 663 (8th Cir. 1988); *Wilson v. Beloit Corp.*, 869 F.2d 1162 (8th Cir. 1989); *Cross v. Coffman*, 304 Ark. 666, 805 S.W.2d 44 (1991); *Daniels v. Riley's Health & Fitness Ctrs.*, 310 Ark. 756, 840 S.W.2d 177 (1992); *Agricultural Group-Compensation Self-Insurer Fund v. Polk County Circuit Court*, 331 Ark. 24, 958 S.W.2d 531 (Ark. 1998); *Srebalus v. Rose Care, Inc.*, 69 Ark. App. 142, 10 S.W.3d 112 (2000); *WENCO Franchise Mgmt., Inc. v. Chamness*, 341 Ark. 86, 13 S.W.3d 903 (2000); *Automated Conveyor Sys. v. Dooley*, 360 Ark. 218, 200 S.W.3d 442 (2004); *Phillips v. United States*, 422 F.3d 709 (8th Cir. 2005); *Craven v. Fulton Sanitation Serv.*, 361 Ark. 390, 206 S.W.3d 842 (2005); *Automated Conveyor Sys. v. Hill*, 362 Ark. 215, 208 S.W.3d 136 (2005).

11-9-106. Penalties for misrepresentation.

(a)(1)(A) Any person or entity who willfully and knowingly makes any material false statement or representation, who willfully and knowingly omits or conceals any material information, or who willfully and knowingly employs any device, scheme, or artifice for the purpose of:

- (i) Obtaining any benefit or payment;
- (ii) Defeating or wrongfully increasing or wrongfully decreasing any claim for benefit or payment; or
- (iii) Obtaining or avoiding workers' compensation coverage or avoiding payment of the proper insurance premium, or who aids and abets for any of said purposes, under this chapter shall be guilty of a Class D felony.

(B) Fifty percent (50%) of any criminal fine imposed and collected under this subdivision or subdivision (a)(2) of this section shall be

paid and allocated in accordance with applicable law to the Death and Permanent Total Disability Trust Fund administered by the Workers' Compensation Commission.

(2) It is to be understood that any person or entity with whom any person identified in subdivision (a)(1) of this section has conspired to achieve the proscribed ends shall, by reason of such conspiracy, be guilty as a principal of a Class D felony.

(b) A copy of subdivision (a)(1) of this section shall be placed on all forms prescribed by the Workers' Compensation Commission for the use of injured employees claiming benefits and for the use of employers in responding to such employees' claims under this chapter.

(c) Where the Workers' Compensation Commission or the Insurance Commissioner finds that false statements or representations were made willfully and knowingly, that material information was willfully and knowingly omitted or concealed, or that any device, scheme, or artifice was willfully and knowingly employed for the purpose of:

(1) Obtaining benefits or payments;

(2) Obtaining, wrongfully increasing, wrongfully decreasing, or defeating any claim for benefit or payment; or

(3) Obtaining or avoiding workers' compensation coverage or avoiding payment of the proper insurance premium under this chapter or that any other criminal violations related thereto were committed, the chairman of the Workers' Compensation Commission or the Insurance Commissioner shall refer the matter for appropriate action to the prosecuting attorney having criminal jurisdiction in the matter.

(d)(1)(A) There shall be established within the State Insurance Department a Workers' Compensation Fraud Investigation Unit, funded by the commission, which will be headed and supervised by a director who may also serve as the director of any other designated insurance fraud investigation division within the department, in which event the director's compensation shall be paid solely from the funds of such insurance fraud investigation division.

(B)(i) The unit herein designated will investigate workers' compensation fraud, additional criminal violations that may be related thereto, and any other insurance fraud matters as may be assigned at the discretion of the director.

(ii) The Insurance Commissioner shall designate the personnel assigned to the unit, who, upon meeting the qualifications established by the Arkansas Commission on Law Enforcement Standards and Training, shall have the powers of specialized law enforcement officers of the State of Arkansas for the purpose of conducting investigations under this subdivision (d)(1)(B). Personnel hired as specialized law enforcement officers shall have a minimum of three (3) years of certified law enforcement experience or its equivalent in national or military law enforcement experience as approved by the Arkansas Commission on Law Enforcement Standards and Training.

(2) The Insurance Commissioner and his or her deputies and assistants and the fraud director and his or her deputies and assistants shall

be vested with the power of enforcing this section and rendering more effective the disclosure and apprehension of persons or entities who abuse the workers' compensation system as established by the General Assembly by making false or misleading statements for the purpose of either obtaining, wrongfully increasing, wrongfully decreasing or defeating the payment of benefits, obtaining or avoiding workers' compensation coverage, or avoiding payment of the proper insurance premium.

(3) It shall be the duty of the unit to assist the Insurance Commissioner and the department in the performance of their duties, and, further, to determine the identity of carriers, employers, or employees who within the State of Arkansas have violated subsection (a) of this section and report the violation to the Workers' Compensation Commission and to the Insurance Commissioner, who shall, in turn, be responsible for reporting the violation to the prosecuting attorney having criminal jurisdiction in the matter.

(4)(A) With respect to the subject of any investigation being conducted by the unit, the Insurance Commissioner and his or her deputies and assistants and the fraud director and his or her deputies and assistants shall have the power of subpoena and may:

(i) Subpoena witnesses;

(ii) Administer oaths or affirmations and examine any individual under oath; and

(iii) Require and compel the production of records, books, papers, contracts, and other documents.

(B) Subpoenas of witnesses shall be served in the same manner as if issued by a circuit court.

(C)(i) If any individual fails to obey a subpoena issued and served pursuant to this section with respect to any matter concerning which he or she may be lawfully interrogated, then upon application of the commissioner or fraud director, the Pulaski County Circuit Court or the circuit court of the county where the subpoena was served may issue an order requiring the individual to comply with the subpoena and to testify.

(ii) Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(D) If any person has refused in connection with an investigation by the fraud director to be examined under oath concerning his or her affairs, then the fraud director is authorized to conduct and enforce by all appropriate and available means any examination under oath in any state or territory of the United States in which any officer, director, or manager may then presently be to the full extent permitted by the laws of the state or territory.

(E) Any person testifying falsely under oath or affirmation in this state as to any matter material to any investigation or hearing conducted pursuant to this subdivision (d)(4), or any workers' compensation hearing, shall upon conviction be guilty of perjury and punished accordingly.

(5) Fees and mileage of the officers serving the subpoenas and of the witnesses in answer to subpoenas shall be as provided by law.

(6)(A) Every carrier or employer who has reason to suspect that a violation of subdivision (a)(1) of this section has occurred shall be required to report all pertinent matters relating thereto to the unit.

(B) No such carrier shall be liable to any employer or employee for any such report, and no employer shall be liable to any employee for such a report unless it knowingly and intentionally includes false information.

(C)(i) Any such carrier or employer who willfully and knowingly fails to report any such violation shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment for a period not to exceed one (1) year or by both fine and imprisonment.

(ii) Fifty percent (50%) of any criminal fine imposed and collected under this subdivision (d)(6)(C) shall be paid and allocated in accordance with applicable law to the fund administered by the commission.

(D) Although not mandated to report suspected violations of subdivision (a)(1) of this section by an employer or employee, any employee who does make such a report shall not be liable to the employer or employee whose suspected violations he or she has reported.

(E) In addition, any immunity from liability provisions of the Arkansas Insurance Code, § 23-60-101 et seq., applicable to the reporting of suspected fraudulent insurance acts shall also be applicable to the reporting of information under this subdivision (d)(6).

(e)(1) For the purpose of imposing criminal sanctions or a fine for violation of the duties of this chapter, the prosecuting attorney shall have the right and discretion to proceed against any person or organization responsible for such violations, both organizational and individual liability being intended by this chapter.

(2) The prosecuting attorney of the district to whom a suspected violation of subsection (a) of this section, § 11-9-402(c), § 11-9-406, or any other criminal violations that may be related thereto, has been referred shall, for the purpose of assisting him or her in such prosecutions, have the authority to appoint as special deputy prosecuting attorneys licensed attorneys at law in the employment of the unit or any other designated insurance fraud investigation division within the department. Such special deputy prosecuting attorneys shall, for the purpose of the prosecutions to which they are assigned, be responsible to and report to the prosecuting attorney.

(f) Notwithstanding any other provision of law, it is the specific intent of this section that active investigatory files as maintained by the department and by the unit be deemed confidential and privileged and not be made open to the public until the matter under investigation is closed by the fraud director with the consent of the Insurance Commissioner, except that such active investigatory files shall also be subject to

any confidentiality provisions of the Arkansas Insurance Code, § 23-60-101 et seq., that are applicable to the investigation of fraudulent insurance acts.

(g) The Insurance Commissioner, with the cooperation and assistance of the Workers' Compensation Commission, is authorized to establish rules and regulations as may be necessary to carry out the provisions of this section.

(h) Nothing in this section shall be deemed to create a civil cause of action.

History. Init. Meas. 1948, No. 4, § 35, Acts 1949, p. 1420; Init. Meas. 1968, No. 1, § 6; Acts 1975 (Extended Sess., 1976), No. 1227, § 17; 1979, No. 253, § 9; A.S.A. 1947, § 81-1335; reen. Acts 1987, No. 1015, § 17; Acts 1993, No. 796, § 5; 1997, No. 808, §§ 1-13; 1999, No. 881, § 1; 2001, No. 743, § 1.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

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CASE NOTES

ANALYSIS

Benefits Not Precluded.

Benefits Precluded.

Elements.

Evidence.

Benefits Not Precluded.

Where question on employment application was too broad and general, and asked for opinion rather than factual information, worker's negative response was not misrepresentation which would preclude worker's compensation benefits. *Sawyer v. Clement Mtarri*, 33 Ark. App. 125, 806 S.W.2d 7 (1991).

Evidence held insufficient to show that the claimant knowingly and willfully made a false representation on the employment application with respect to her physical condition. *St. Vincent Infirmary Medical Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

Benefits Precluded.

A false representation as to a physical condition in procuring employment will preclude the benefits of the Workers' Com-

pensation Act for an otherwise compensable injury if it is shown that the employee knowingly and willfully made a false representation as to his physical condition, the employer relied upon the false representation, and the reliance was a substantial factor in the employment, and there was a casual connection between the false representation and the injury. *Shippers Transp. v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979); *Shock v. Wheeling Pipe Line*, 270 Ark. 57, 603 S.W.2d 446 (1980); *Roberts-McNutt, Inc. v. Williams*, 15 Ark. App. 240, 691 S.W.2d 887 (1985), *aff'd*, 288 Ark. 587, 708 S.W.2d 87 (Ark. 1986).

Evidence supported finding that claimant made a false representation to employer which precluded him from receiving benefits for subsequent injury. *Shock v. Wheeling Pipe Line*, 270 Ark. 57, 603 S.W.2d 446 (1980).

Elements.

A false representation on an employment application bars recovery under this chapter when three factors are established: (1) the employee must have know-

ingly and wilfully made a false representation as to her physical condition; (2) the employer must have relied upon the false representation, and this reliance must have been a substantial factor in the hiring; and (3) there must have been a causal connection between the false representation and the injury. *St. Vincent Infirmary Medical Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

Evidence.

Evidence that claimant was malingering, and evidence of claimant's spouse's active participation, held sufficient. *Peete v. State*, 59 Ark. App. 186, 955 S.W.2d 708 (1997).

Cited: *Second Injury Fund v. Riceland Foods, Inc.*, 17 Ark. App. 104, 704 S.W.2d 635 (1986).

11-9-107. Penalties for discrimination for filing claim.

(a)(1) Any employer who willfully discriminates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of the individual's claim for benefits under this chapter, or who in any manner obstructs or impedes the filing of claims for benefits under this chapter, shall be subject to a fine of up to ten thousand dollars (\$10,000) as determined by the Workers' Compensation Commission.

(2) This fine shall be payable to the Second Injury Trust Fund and paid by the employer and not by the carrier.

(b)(1) In addition, the prevailing party shall be entitled to recover costs and a reasonable attorney's fee payable from the fine.

(2) Provided, however, if the employee is the nonprevailing party, the attorney's fee and costs shall, at the election of the employer, be paid by the employee or deducted from future workers' compensation benefits.

(c) The employer may also be guilty of a Class D felony.

(d) This section shall not be construed as establishing an exception to the employment at will doctrine.

(e) A purpose of this section is to preserve the exclusive remedy doctrine and specifically annul any case law inconsistent herewith, including, but not necessarily limited to: *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991); *Mapco, Inc. v. Payne*, 306 Ark. 198, 812 S.W.2d 483 (1991); and *Thomas v. Valmac Industries, Inc.*, 306 Ark. 228, 812 S.W.2d 673 (1991).

History. Init. Meas. 1948, No. 4, § 35, Acts 1949, p. 1420; Init. Meas. 1968, No. 1, § 6; A.S.A. 1947, § 81-1335; Acts 1993, No. 796, § 6.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act,

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

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Arkansas Workers' Compensation Cases, 45 Ark. L. Rev. 939.

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Claimants, 16 U. Ark. Little Rock L.J. 373.

CASE NOTES

ANALYSIS

Purpose.
Applicability.
Effect of Amendments.
Joint Petitions.
Post-Injury Discharge.
Retaliatory Discharge.

Purpose.

This section was intended by the legislature to be a remedy for willful discrimination by the employer done in retaliation for the employee's having sought compensation under this chapter, not as a remedy for discrimination by the employer on the basis of the employee's disability as a result of the injury. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

Applicability.

The provisions of the 1993 amendment apply only to injuries which occur after July 1, 1993; the legislature did not intend subsection (e) to be applied retroactively. *Stanton v. Larry Fowler Trucking, Inc.*, 52 F.3d 723 (8th Cir. 1995).

For purposes of this section, the date of the injury was the date the worker was discharged from employment. *Rohrer v. Hart's Mfg. Co.*, 53 Ark. App. 4, 917 S.W.2d 180 (1996).

There is no public policy in this state that requires an employer to keep an employee whom the employer recognizes has become physically unsuited for the job. *Brown v. Pepsico, Inc.*, 844 F. Supp. 517 (W.D. Ark. 1994).

This section's annulment of a cause of action in tort for retaliatory discharge is applicable to cases in which the date of discharge is after July 1, 1993. *Malone v. Trans-States Lines*, 325 Ark. 383, 926 S.W.2d 659 (1996).

Effect of Amendments.

The legislative enactment of the 1993 amendments was a direct annulment of the former law supporting a private cause of action for retaliatory discharge in connection with worker's compensation

claims. *Brown v. Pepsico, Inc.*, 844 F. Supp. 517 (W.D. Ark. 1994).

This section was amended specifically to annul the holding in *Wal-Mart Stores, Inc. v. Baysinger*, 306 Ark. 239, 812 S.W.2d 463 (1991); however, the amendments are only applicable to injuries occurring after July 1, 1993. *Pedigo v. P.A.M. Transp., Inc.*, 891 F. Supp. 482 (W.D. Ark. 1994).

Wrongful discharge claim is not governed by any law other than that in effect at the time it occurred; it was the intent of the General Assembly to abolish the cause of action for wrongful discharge as of July 1, 1993. *Tackett v. Crain Automotive*, 321 Ark. 36, 899 S.W.2d 839 (1995).

This section was amended in 1993 in order to preserve the exclusive remedy of the Workers' Compensation Act by eliminating the common-law remedies for retaliatory or wrongful discharge. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

Joint Petitions.

Former employer's claim was not barred by the language of the joint petition filed in the workers' compensation proceeding, wherein she agreed that if her petition for workers' compensation benefits was approved she would have no further claim under the Arkansas Workers' Compensation Act of any nature, since her suit in circuit court was not a claim under the Arkansas Workers' Compensation Act but a cause of action for retaliatory discharge. *Rohrer v. Hart's Mfg. Co.*, 53 Ark. App. 4, 917 S.W.2d 180 (1996).

Post-Injury Discharge.

Where an employee has alleged two separate injuries, one being a work-related physical injury, for which she has received workers' compensation benefits, and one being a subsequent nonphysical injury arising from employer's action in terminating her based upon her physical disability as a result of the injury, the first injury is exclusively cognizable under the Workers' Compensation Act (see § 11-9-105), while the subsequent injury is of the type envisioned by the Arkansas Civil

rights Act, § 16-123-101 et seq. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

There is no remedy under this chapter for an employee who is terminated from his or her job on the basis of a disability after the end of the rehabilitation and compensation period; thus, the exclusive-remedy provision of this chapter does not preclude an employee from bringing an action under the Arkansas Civil Rights Act, § 16-123-101 et seq., based upon employer's alleged discrimination in terminating her on the basis of her permanent restrictions and impairments. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

Retaliatory Discharge.

Claims of retaliatory discharge which are filed after July 1, 1993, the effective date of Acts 1993, No. 796, are claims made to the Arkansas Worker's Compensation Commission rather than to the courts; this remedy should not be construed as creating an exception to the employment-at-will doctrine. *Brown v. Pepsico, Inc.*, 844 F. Supp. 517 (W.D. Ark. 1994).

Substantial evidence supported the

finding that the employer did not willfully terminate the claimant where the claimant testified that the owner of the employer told him that he was no longer needed and that he had been replaced, but (1) the owner stated that he told the claimant to come in the next morning to discuss his work schedule, (2) the bookkeeper in charge of payroll testified that she did not have any documentation that the claimant had been fired and that his case file simply reflected that he had been injured, paid workers' compensation benefits, and had not returned to work when he was released by his doctor, and (3) the claimant's supervisor testified that she had the authority to hire and fire personnel, and that, to her knowledge, the claimant had not been fired. *Stiger v. State Line Tire Serv.*, 72 Ark. App. 250, 35 S.W.3d 335 (2000).

Cited: *Shippers Transp. v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979); *Second Injury Fund v. Riceland Foods, Inc.*, 17 Ark. App. 104, 704 S.W.2d 635 (1986); *Cross v. Coffman*, 304 Ark. 666, 805 S.W.2d 44 (1991); *Patton v. TPI Petroleum, Inc.*, 356 F. Supp. 2d 921 (E.D. Ark. 2005).

11-9-108. Waiver of compensation void — Exception.

(a) No agreement by an employee to waive his or her right to compensation shall be valid, and no contract, regulation, or device whatsoever shall operate to relieve the employer or carrier, in whole or in part, from any liability created by this chapter, except as specifically provided elsewhere in this chapter.

(b)(1) However, any officer of a corporation, sole proprietor, partner of a partnership, member of a limited liability company, member of a professional association, or self-employed employer who is not a subcontractor and who owns and operates his or her own business may by agreement or contract exclude himself or herself from coverage or waive his or her right to coverage or compensation under this chapter.

(2) If the exclusion from coverage of the officer of a corporation, sole proprietor, partner of a partnership, member of a limited liability company, member of a professional association, or self-employed employer reduces the number of employees of the business to fewer than three (3), the employer shall nevertheless continue to provide workers' compensation coverage for the employees.

History. Init. Meas. 1948, No. 4, § 20, § 1; 1981, No. 631, § 3; A.S.A. 1947, § 81-Acts 1949, p. 1420; Acts 1971, No. 162, 1320; Acts 2007, No. 546, § 1.

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CASE NOTES

ANALYSIS

Claims for Benefits.

Executives.

Private Insurance.

Self-Employed Employers.

Stockholder.

Waiver.

Claims for Benefits.

Neither this section nor § 11-9-508 authorizes the medical provider to initiate a claim on behalf of an employee in the event a worker elects not to file a claim for benefits. *Sloat Chiropractic Clinic v. Dat-sun*, 17 Ark. App. 161, 706 S.W.2d 181 (1986).

Executives.

This section is designed for permissive waiver of coverage by executives, and it does not confer employee status on such executives automatically. Whether a corporate officer is an employee is to be determined by nature of work and circumstances of each case. *Gilbert v. Gilbert Timber Co.*, 292 Ark. 124, 728 S.W.2d 507 (1987).

Private Insurance.

President and general manager of a corporation, who, along with his wife, owned all of the corporate stock could not disregard the corporate character of his employer and claim the status of a proprietor under this section in order to come within the terms of private insurance since he was not the owner of anything except shares of stock in the corporation. *Prudential Ins. Co. of Am. v. Jones*, 1 Ark. App. 51, 613 S.W.2d 114 (1981).

Self-Employed Employers.

Subsection (b) of this section applies only to corporations, and therefore “self-employed employers” must be corporate officers. *Gilbert v. Gilbert Timber Co.*, 19 Ark. App. 93, 717 S.W.2d 220 (1986), *aff’d*, 292 Ark. 124, 728 S.W.2d 507 (1987).

The terms “sole proprietor” and “self-employed employer,” as used in the Work-

er’s Compensation Act, are neither synonymous nor interchangeable. Under § 11-9-102(2) (see now § 11-9-102(10)(E)), defining “employee”), a “sole proprietor” must file written notice with the Workers’ Compensation Commission to be included in the definition of an “employee,” while under § 11-9-108(b), a “self-employed employer” may agree or contract to exclude himself or herself from coverage. *Gilbert v. Gilbert Timber Co.*, 19 Ark. App. 93, 717 S.W.2d 220 (1986), *aff’d*, 292 Ark. 124, 728 S.W.2d 507 (1987).

Phrase “self-employed employer” refers to corporate officers and does not include sole proprietors and partners. *Gilbert v. Gilbert Timber Co.*, 292 Ark. 124, 728 S.W.2d 507 (1987).

Stockholder.

Where the claimant, who, with his wife, owned all of the corporate stock, had not elected to exclude himself from coverage under this chapter, injuries would be compensable if suffered in the course of his employment. *Queen v. Royal Serv. Co.*, 6 Ark. App. 149, 645 S.W.2d 343 (1982).

Waiver.

This section was intended to protect employees against practice of unscrupulous employers to avoid compensation liability by having employees sign a contract which waived all rights to compensation in consideration of being employed. *Bryan v. Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969).

There is no provision in the law which will force an injured employee to accept or keep compensation benefits to which he is entitled after they are paid or tendered to him. *Bryan v. Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969).

Where employee voluntarily refunded amounts compensation carrier had tendered as compensation and medical payments because he wished to collect personal injury judgment against co-employee from carrier under employer’s policy which was later held not to cover

the judgment, the refunded amounts belonged to the employee and not to the carrier and employee was entitled to them even though period of limitations for compensation claims had expired. *Bryan v. Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969).

Fact that employee applied for and received benefits for nonoccupational sickness and accident on a group insurance policy did not constitute a waiver of any claims for workers' compensation on the basis of the same illness. *International Paper Co. v. Langley*, 251 Ark. 859, 475 S.W.2d 686 (1972).

The claimant was entitled to mileage costs for commuting to and from a university, notwithstanding a written rehabilitation agreement which expressly excluded such costs, since § 11-9-505 makes the reimbursement of reasonable travel expenses mandatory and since this section invalidated the parties' written agreement. *Air Compressor Equip. Co. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

Workers' Compensation Commission erred in finding that an enrollee in a non-profit organization's alcoholism program was not an employee and in denying him benefits where his work provided a benefit to the non-profit and the agreement signed by the enrollee waiving ben-

efits did not necessarily waive his status as an employee, particularly where the conduct of the parties showed an implied contract of hire after the agreement was signed; the mere fact that the enrollee signed such an agreement did not defeat the substance of the parties' relationship. *Dixon v. Salvation Army*, 86 Ark. App. 132, 160 S.W.3d 723 (2004), rev'd, 360 Ark. 309, 201 S.W.3d 386 (2005).

In a workers' compensation matter, an agreement signed by the employee to select the State of Ohio as the state of exclusive remedy was void and unenforceable under both the Arkansas Workers' Compensation Law and the Arkansas Insurance Code, subdivision (c)(4)(A) of this section; the agreement at issue was quite clearly a contract to relieve the employer in whole or in part from any liability. *Williams v. Johnson Custom Homes*, 374 Ark. 457, 288 S.W.3d 607 (2008).

Cited: *Georgia-Pacific Corp. v. Norsworthy*, 244 Ark. 399, 425 S.W.2d 320 (1968); *Irby v. Davis*, 311 F. Supp. 577 (E.D. Ark. 1970); *Wasson v. Losey*, 11 Ark. App. 302, 669 S.W.2d 516 (1984); *Garcia v. A&M Roofing*, 89 Ark. App. 251, 202 S.W.3d 532 (2005); *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005); *Steinert v. Ark. Workers' Comp. Comm'n*, 2009 Ark. App. 719, — S.W.3d — (2009).

11-9-109. Agreement to pay premium void.

(a) No agreement by an employee to pay any portion of the premium paid by his or her employer to a carrier or to contribute to a safety program as provided under § 11-9-409 or a benefit fund or department maintained by the employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid.

(b) Any employer who makes a deduction for those purposes from the pay of any employee entitled to the benefits of this chapter shall be guilty of a Class D felony.

History. Init. Meas. 1948, No. 4, § 20, Acts 1949, p. 1420; A.S.A. 1947, § 81-1320; Acts 1993, No. 796, § 7.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of

2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

ANALYSIS

Construction.
Applicability.

Construction.

Allowing the offsets pursuant to the clear language of § 11-9-411(a) did not violate this section, which states that the claimant could not be required to pay the employer's workers' compensation premium. *Dooley v. Automated Conveyor Sys.*, 84 Ark. App. 412, 143 S.W.3d 585 (2004).

Applicability.

This section does not prohibit an employer from contracting with independent

contractors to provide Workers' Compensation insurance for them and deduct their pro rata share of the premiums from their remuneration nor entitle the independent contractors to a refund of the premiums so deducted. *Hughes v. Hooker Bros.*, 237 Ark. 544, 374 S.W.2d 355 (1964).

Cited: *Georgia-Pacific Corp. v. Norsworthy*, 244 Ark. 399, 425 S.W.2d 320 (1968); *Irby v. Davis*, 311 F. Supp. 577 (E.D. Ark. 1970); *Wasson v. Losey*, 11 Ark. App. 302, 669 S.W.2d 516 (1984).

11-9-110. Compensation nonassignable, etc., and payable to dependents only — Child support obligations excepted.

(a) The right to compensation shall not be assignable and shall not be subject to garnishment, attachment, levy, execution, or any other legal process, except for child support obligations and moneys retained by the Department of Correction under § 12-30-406(a)(1).

(b) Money compensation to dependents of a deceased employee shall not constitute assets of the estate of the deceased employee and shall be payable to and for the benefit of the dependents alone.

(c)(1) On or after June 30, 1993, the Workers' Compensation Commission shall forward monthly a computer tape listing the name, address, and social security number, if available, on all persons for whom the commission has established a file during the preceding month to the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration. The computer tape shall also include the name of the workers' compensation carrier and the name of the employer.

(2) The same information shall be provided to individuals who apply for the information with the commission on an individual employee to an individual certifying that they have an interest in the child support obligations of the employee on whom the information is requested.

(d)(1) Amounts withheld from weekly compensation benefits for child support obligations shall not exceed twenty-five percent (25%) of the benefit amount.

(2) Amounts withheld from a lump-sum settlement on a joint petition for child support obligations shall not exceed fifty percent (50%) of the settlement amount.

(e) Any amount withheld under subsection (d) of this section shall be paid through the appropriate court payable to the person or agency to whom the obligation is payable.

(f) Any amount withheld pursuant to the provisions of this section shall for all purposes be treated as if it were paid to the employee as workers' compensation and paid by the employee to the person or agency to whom the obligation is payable.

(g) For purposes of this section, "child support obligations" is defined as only those support obligations that are contained in a decree or order of the circuit court which provides for the payment of money for the support and care of any child or children.

History. Init. Meas. 1948, No. 4, § 21, 1321; Acts 1987, No. 524, § 2; 1995, No. Acts 1949, p. 1420; A.S.A. 1947, § 81-1184, §§ 21, 28; 2001, No. 1651, § 1.

RESEARCH REFERENCES

Ark. L. Rev. Transmissibility of Certain Contingent Future Interests, 5 Ark. L. Rev. 111.

Note, In re Holt: Personal Property Exemptions and the Forgotten Arkansas Constitution, 42 Ark. L. Rev. 759.

Laurence, In re Holt and the Re-making of Arkansas Exemption Law: Commentary after the Rout, 43 Ark. L. Rev. 235.

U. Ark. Little Rock L.J. Legislative Survey, Business Law, 4 U. Ark. Little Rock L.J. 579.

Survey — Family Law, 10 U. Ark. Little Rock L.J. 577.

CASE NOTES

ANALYSIS

Construction.

Award by State Claims Commission.

Bankruptcy.

Claims for Benefits.

Continuation of Exemption.

Standing.

Construction.

The language in subsection (a) of this section pertaining to the garnishment of benefits and "other legal process" necessarily implies a continuing court-decreed obligation as set forth in subsection (g) of this section, a failure of the obligated party to make regular payments, and an established right on the part of the entitled party to a withholding of the amount specified in a decree or order of the chancery or county court. *Munn v. Munn*, 315 Ark. 494, 868 S.W.2d 478 (1994).

Subsection (c) of this section provides a means for any party seeking enforcement of a child support obligation to receive information from the Workers' Compensation Commission about an obligated employee. *Munn v. Munn*, 315 Ark. 494, 868 S.W.2d 478 (1994).

The information supplied pursuant to subsection (c) of this section is limited to the name, address, and social security number of the obligated employee, along with the names of the employer and the workers' compensation carrier, and may be used in an application to a court for enforcement through legal process. *Munn v. Munn*, 315 Ark. 494, 868 S.W.2d 478 (1994).

Award by State Claims Commission.

Where State Claims Commission awarded payment to debtor but did not, under § 19-10-204, have jurisdiction to make the award, the award was in the nature of an award under Workers' Compensation and was not for the benefit of creditors in bankruptcy proceeding and was not subject to legal process. *Dinning v. Wills*, 4 B.R. 475 (Bankr. E.D. Ark. 1980).

Bankruptcy.

Workers' Compensation benefits which were received by the debtor prior to the filing of his petition for relief under Chapter 13 of the Bankruptcy Code and were segregated from other assets were exempt from payment to unsecured creditors. In

re Covey, 1984 Bankr. LEXIS 6408, 36 B.R. 696 (Bankr. W.D. Ark. 1984).

Claims for Benefits.

A medical provider does not have standing to initiate a claim on the basis of an employee's execution of an assignment of payment, as this section provides that the right to compensation is not assignable. *Sloat Chiropractic Clinic v. Datsun*, 17 Ark. App. 161, 706 S.W.2d 181 (1986).

Continuation of Exemption.

Workers' Compensation proceeds continue to be exempt from claims of creditors after the money has been paid the injured worker; any other interpretation would defeat the purpose of the exemp-

tion, denying the worker the use of his money. In *re Covey*, 1984 Bankr. LEXIS 6408, 36 B.R. 696 (Bankr. W.D. Ark. 1984).

Standing.

Where wife, having knowledge of her husband's outstanding workers' compensation claim, failed to reserve in the divorce decree any interest in any future lump-sum settlement that he might make, wife had no right to ask the court on appeal to decide how the settlement money should be spent by her former spouse. *Munn v. Munn*, 315 Ark. 494, 868 S.W.2d 478 (1994).

Cited: *Martin v. Scharbor*, 95 Ark. App. 52, 233 S.W.3d 689 (2006).

11-9-111. Compensation payable to certain alien dependents.

(a) Compensation to alien nonresidents of the United States or Canada shall be the same in amount as provided for residents, except that alien nonresident dependents in any foreign country shall be limited to the surviving wife or children or, if there is no surviving wife or children, to the surviving father or mother whom the employee has supported, either wholly or in part, for the period of one (1) year prior to the date of the injury.

(b) Upon its own motion or upon application of an interested party, the Workers' Compensation Commission may order the payment of all future compensation to be paid in one (1) lump sum, which shall be equal to one-half (½) of the face value of all future installments of compensation.

History. Init. Meas. 1948, No. 4, § 16, Acts 1949, p. 1420; A.S.A. 1947, § 81-1316.

RESEARCH REFERENCES

ALR. Application of workers' compensation laws to illegal aliens. 121 A.L.R.5th 467.

CASE NOTES

Beneficiaries.

Both of a deceased employee's parents were properly awarded dependent benefits under § 11-9-527 as § 11-9-527 and this section had to be read together to understand the Arkansas legislature's intent, and the appellate court was not convinced that by the use of the word "or" to separate the words father and mother in this section, the legislature intended to

render the award of benefits to each parent provided by § 11-9-527 void. *White Oak Constr. Co. v. Olvera*, 2011 Ark. App. 682, — S.W.3d — (2011).

Deceased employee's parents were properly awarded dependent benefits under § 11-9-527 as the one-year period in this section would have been July 2006 through July 2007, and the testimony presented by his parents, coupled with a

portion of the records of money transfers (July 3, 2006 through July 25, 2007), supported the determination that the decedent provided support for one year prior

to the date of his death. *White Oak Constr. Co. v. Olvera*, 2011 Ark. App. 682, — S.W.3d — (2011).

11-9-112. Preference for due compensation.

Compensation due an injured employee or his or her dependents shall have the same preference as is allowed by law to an employee for unpaid wages.

History. Init. Meas. 1948, No. 4, § 22, Acts 1949, p. 1420; A.S.A. 1947, § 81-1322.

11-9-113. Mental injury or illness.

(a)(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.

(2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

(b)(1) Notwithstanding any other provision of this chapter, where a claim is by reason of mental injury or illness, the employee shall be limited to twenty-six (26) weeks of disability benefits.

(2)(A) In case death results directly from the mental injury or illness within a period of one (1) year, compensation shall be paid the dependents as provided in other death cases under this chapter.

(B) Death directly or indirectly related to the mental injury or illness occurring one (1) year or more from the incident resulting in the mental injury or illness shall not be a compensable injury.

History. Acts 1993, No. 796, § 8.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall im-

pliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

ALR. Right to workers' compensation for emotional distress or like injury suffered by claimant as a result of nonsudden stimuli — Right to compensation under particular statutory provisions. 97 A.L.R.5th 1.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Requisites of, and factors affecting, compensability. 106 A.L.R.5th 111.

Right to workers' compensation for

physical injury or illness suffered by claimant as result of sudden mental stimuli — Compensability under particular circumstances. 107 A.L.R.5th 441.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of nonsudden stimuli — Compensability under particular circumstances. 108 A.L.R.5th 1.

Right to workers' compensation for physical injury or illness suffered by claimant as result of sudden mental stimuli — Right to compensation under particular statutory provisions and requisites of, and factors affecting, compensability. 109 A.L.R.5th 161.

Right to workers' compensation for physical injury or illness suffered by claimant as result of nonsudden mental

stimuli — Compensability of particular physical injuries or illnesses. 112 A.L.R.5th 509.

Compensability under occupational disease statutes of emotional distress or like injury suffered by claimant as result of nonsudden stimuli. Occupational Disease—Nonsudden" generated="0" attreq="0"/>113 A.L.R.5th 115.

Ark. L. Notes. Copeland, Workers' Compensation, Exclusivity, and the "Balderdash" response, 1996 Ark. L. Notes 1.

Ark. L. Rev. Newell, Travelers Insurance Co. v. Smith: Arkansas Employers Are Exposed to Greater Liability, 52 Ark. L. Rev. 503.

U. Ark. Little Rock L.J. Lucy, Workers' Compensation Law: Act 797 of 1993 and the Definition of "Compensable Injury," 20 U. Ark. Little Rock L.J. 265.

CASE NOTES

ANALYSIS

Constitutionality.

Action by Spouse.

Bipolar Disorder.

Duration of Compensation.

Evidence.

Injury Held Compensable.

Requirements.

Constitutionality.

Legislature had a rational and legitimate public purpose for distinguishing between mental and physical workers' compensation injuries under subdivision (b)(1) of this section, limiting compensation for mental injuries to 26 weeks, because there was a greater potential for fraudulent claims being advanced for mental injuries, and permitting more extensive benefits for mental injuries would act as a disincentive for workers to devote themselves fully to psychological or psychiatric treatment and recovery. Therefore, subdivision (b)(1) did not violate equal protection under Ark. Const., Art. 2, § 3. *Pat Salmon & Sons, Inc. v. Pate*, 2009 Ark. App. 272, 307 S.W.3d 46 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 681 (May 27, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 635 (Sept. 24, 2009).

Action by Spouse.

Because action for emotional distress by

wife of injured employee was one manifestly premised on a nonphysical injury, and because her injury was not compensable and beyond the scope of coverage of this chapter, the claim was not barred by the exclusive-remedy provision of this chapter. *Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997).

Bipolar Disorder.

Employee's bipolar disorder was not compensable where there was no testimony as to whether the bipolar diagnosis met the criteria of the Diagnostic and Statistical Manual of Mental Disorders. *Hope Livestock Auction Co. v. Knighton*, 62 Ark. App. 74, 966 S.W.2d 943 (1998), overruled in part, *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

Although it would be preferable in cases of mental injury or illness for a psychiatrist or psychologist to correlate the basis of his opinion to the DSM criteria, substantial evidence supported the determination that the claimant's bipolar disorder was a compensable work-related injury where a physician, in both his deposition and progress notes, described the claimant's bipolar disorder in such detail that the Workers' Compensation Commission could easily make the finding that the diagnosis met the DSM-IV criteria. *Hope Livestock Auction Co. v. Knighton*, 67 Ark. App. 165, 992 S.W.2d 826 (1999).

Duration of Compensation.

Court rejected employee's claim that under subdivision (b)(1) of this section, he was entitled to an additional 26 weeks' compensation for mental injuries on top of the more than 26 weeks he had received of temporary total disability benefits. The statute was clearly designed to limit the duration of compensation for mental injuries, not extend it beyond that to which the employee was already entitled. *Pat Salmon & Sons, Inc. v. Pate*, 2009 Ark. App. 272, 307 S.W.3d 46 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 681 (May 27, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 635 (Sept. 24, 2009).

Evidence.

Where claimant sustained compensable physical injuries, and his primary care physician recommended that he not return to work until he had a psychological evaluation, claimant seeking to determine whether his mental distress was the result of his physical injuries should have been provided with a full psychological evaluation by a licensed psychiatrist or psychologist. *Terrell v. Arkansas Trucking Serv., Inc.*, 60 Ark. App. 93, 959 S.W.2d 70 (1998).

Compensation denied where the claimant failed to meet the subdivision (a)(2) requirement of showing that the diagnosis of the condition met the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders; the burden of proof was a preponderance of the evidence. *Branscum v. RNR Constr. Co.*, 60 Ark. App. 116, 959 S.W.2d 429 (1998).

Evidence was sufficient to support an award of 26 weeks of disability benefits to the claimant where there was testimony from the claimant, his wife, and two physicians regarding the claimant's problems being around people and functioning in society due to his bipolar disorder. *Hope*

Livestock Auction Co. v. Knighton, 67 Ark. App. 165, 992 S.W.2d 826 (1999).

Arkansas Workers' Compensation Commission was correct in affirming the denial of a claimant's request for additional disability benefits for the claimant's mental injury; the claimant failed to show entitlement to compensation by a preponderance of the evidence and the Commission displayed a substantial basis for the denial of the relief requested by the claimant. *Marshall v. Madison County*, 81 Ark. App. 57, 98 S.W.3d 452 (2003).

Workers' Compensation Commission did not err in finding that claimant failed to prove by a preponderance of the evidence that his cognitive dysfunction and psychological problems were causally related to his having being accidentally shocked with 440 volts of electricity. *Arbaugh v. A.G. Processing, Inc.*, 360 Ark. 491, 202 S.W.3d 519 (2005).

Injury Held Compensable.

Where employee began stuttering and having difficulty walking after receiving an electrical shock, and his physicians concluded that the psychological disorders were the direct result of the electrical shock, and where employee also received a burn on his hand from the shock, i.e., a physical injury, then employee's mental injury was compensable. *Dugan v. Jerry Sweetster, Inc.*, 54 Ark. App. 401, 928 S.W.2d 341 (1996).

Requirements.

This section and § 11-9-102(5)(A) set out a requirement that a physical injury precede and cause the mental injury in order for the mental injury to be compensable under this chapter. *Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997); *Amlease, Inc. v. Kuligowski*, 59 Ark. App. 261, 957 S.W.2d 715 (1997).

Cited: *Phillips v. Arkansas State Hwy. & Transp. Dep't*, 52 Ark. App. 170, 916 S.W.2d 128 (1996); *Ritchie Grocery v. Glass*, 70 Ark. App. 222, 16 S.W.3d 289 (2000).

11-9-114. Heart or lung injury or illness.

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternatively, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his or her burden of proof.

History. Acts 1993, No. 796, § 8.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall im-

pliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Lucy, Workers' Compensation Law: Act 797 of 1993

and the Definition of "Compensable Injury," 20 U. Ark. Little Rock L.J. 265.

CASE NOTES

ANALYSIS

Construction.
Accident as Cause Shown.
Evidence.

Construction.

Logical interpretation of subdivisions (b)(1) and (2) of this section is that if a heart attack is proved to have been caused by the physical or mental stress arising out of the performance of work that is extraordinary and unusual in comparison to the employee's usual work, the heart attack is compensable; but where an employee suffers an on-the-job heart attack in the absence of work that is unusual and extraordinary, or in the absence of the occurrence of some unusual or unpredicted incident, it is not compensable, regardless of the level of physical or mental distress the employee experiences. *Family Dollar Stores v. Edwards*, 97 Ark. App. 156, 245 S.W.3d 181 (2006).

In interpreting the statute, courts hold that preexisting conditions do not preclude a finding that a work-related incident is the major cause of physical harm. *Estate of Slaughter v. City of Hampton*, 98 Ark. App. 409, 255 S.W.3d 872 (2007).

Accident as Cause Shown.

An accident was held to be the major cause of the claimant's heart attack where he suffered the attack immediately following exposure to unusually heavy and thick smoke while ventilating the roof of a burning building, and where the work that precipitated the heart attack was unusual and extraordinary because the claimant usually drove a fire truck. *City of Blytheville v. McCormick*, 56 Ark. App. 149, 939 S.W.2d 855 (1997).

Where an employee had a fatal heart attack while he was assembling lawn tractors and other equipment while at work, and his wife was awarded dependency benefits, it was not error for the Workers' Compensation Commission to find that the work-related conditions were the major cause of the employee's heart attack; the same evidence supporting the Commission's findings that the employee's accident was the major cause of his heart attack and that his work required extraordinary and unusual exertion also supported the Commission's award of dependency benefits. *Huffy Serv. First v. Ledbetter*, 76 Ark. App. 533, 69 S.W.3d 449 (2002).

Appellate court affirmed a workers' compensation award to the wife of dece-

dent, who had a heart attack after he broke up a fight at school, as a medical doctor testified that the energy expended in breaking up the fight was the major cause of the heart attack and, thus, it was a compensable injury under this section. *Dollarway Sch. Dist. v. Lovelace*, 90 Ark. App. 145, 204 S.W.3d 64 (2005).

Employee was properly awarded workers' compensation benefits for a heart attack that she suffered one day after she was robbed at gunpoint while working as a cashier as no serious argument could be made that the combined physical exertion and emotional distress that she experienced while being robbed at gunpoint were not "extraordinary and unusual." *Family Dollar Stores v. Edwards*, 97 Ark. App. 156, 245 S.W.3d 181 (2006).

Arkansas Workers' Compensation Commission erred in denying a widow's claim for temporary total disability benefits and the payment of expenses where the employee's treating physician was resolute in the opinion that the accidental inhalation of chlorine gas was the major precipitating event that led to the employee's respiratory failure, not the employee's HIV or chronic obstructive pulmonary disease (COPD) in the form of emphysema. *Estate of Slaughter v. City of Hampton*, 98 Ark. App. 409, 255 S.W.3d 872 (2007).

Employee's exertion in carrying sheets of drywall on an extremely hot day when the employee assisting him was small and inexperienced were unusual conditions that allowed the employee to recover workers' compensation benefits for a myocardial infarction, or heart attack, under subsection (b) of this section. *Ayers Drywall & Insulation v. Carey*, 2009 Ark. App. 749, 352 S.W.3d 334 (2009).

Workers' compensation benefits were properly awarded to an employee, a truck

driver, for a compensable injury in the form of a heart attack, pursuant to subsection (a) of this section, because exposure to extreme heat while installing a new mud flap on a truck was the major cause of the employee's heart attack and death; despite any preexisting propensities for such an event, the employee had performed the job duties without restrictions. *J Mar Express, Inc. v. Poteete*, 2011 Ark. App. 122, — S.W.3d — (2011).

Evidence.

A fireman's activities within 48 hours of his death may have been the major cause of his heart attack where those activities included participation in a strenuous encounter and agility test on a very hot and humid day and it appeared that a physician who testified in the proceeding was not aware of the fireman's activities. *Williford v. City of Little Rock*, 62 Ark. App. 198, 969 S.W.2d 687 (1998).

Substantial evidence supported the decision that the claimant suffered a compensable injury where the claimant testified that he engaged in unusual and extraordinary exertion on the day of employment at issue. *Mountain Home Mfg. v. Hafer*, 66 Ark. App. 127, 991 S.W.2d 127 (1999).

Finding by the Arkansas Workers' Compensation Commission that the truck driver's cardiac injury was work related was supported by substantial evidence when the cardiac incident occurred after the driver assisted others in moving 800 pounds of equipment and the driver's treating cardiologist testified that the strenuous work conditions were a major cause of the driver's heart injury. *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005).

11-9-115. Disclosure of child support obligations.

(a)(1) At any time an application is made for workers' compensation, an employer shall require the applicant for compensation to state whether or not the applicant has child support obligations, if the obligations are current or past due, and to whom the obligations are payable.

(2) The application shall also include the name of the workers' compensation carrier and the name of the employer.

(b) The employer shall forward a copy of the application to the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration.

History. Acts 1993, No. 1185, § 1. Interstate Family Support Act, § 9-17-101 et seq.
Cross References. The Uniform In-

11-9-116. Fund transfer to support Workers' Compensation Fraud Unit of the State Insurance Department.

(a)(1) One (1) month before the beginning of any fiscal quarter, the Insurance Commissioner shall provide to the Workers' Compensation Commission the estimated funding need of the Workers' Compensation Fraud Investigation Unit of the State Insurance Department for the ensuing quarter.

(2) Such provided certification shall itemize each position to be utilized in the unit and funded by the commission and make estimates of all other budgetary line items necessary to provide support to the unit.

(3) This certification must deduct unexpended and unencumbered balances of the unit from the previous quarter, so that only the current need, excluding unexpended and unencumbered funds, is certified for fund transfer authorized in this section.

(b)(1) On or before the first day of each fiscal quarter, the commission shall certify to the Chief Fiscal Officer of the State that funds are available for transfer, upon which certification the Chief Fiscal Officer of the State, the Treasurer of State, and the Auditor of State shall transfer those funds from the Workers' Compensation Fund of the commission to the fund account used for the maintenance, operation, and support of the unit.

(2) The sum of the four (4) quarterly transfers in each fiscal year ending June 30 cannot exceed one hundred fifty thousand dollars (\$150,000).

History. Acts 1999, No. 1179, § 9. not apply to this section which was enacted subsequently.
A.C.R.C. Notes. References to "this chapter" in §§ 11-9-101 — 11-9-115 may

11-9-117. Carpal tunnel syndrome guidelines.

Pursuant to its rulemaking authority, the Workers' Compensation Commission shall be empowered to enact medical diagnostic and treatment guidelines regarding occupational carpal tunnel syndrome upon the joint recommendation of the Arkansas chapter of the American Federation of Labor and Congress of Industrial Organizations and the Arkansas State Chamber of Commerce.

History. Acts 2001, No. 1281, § 2. not apply to this section which was enacted subsequently.
A.C.R.C. Notes. References to "this chapter" in §§ 11-9-101—11-9-116 may

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of assembly, Labor Law, 24 U. Ark. Little Rock Legislation, 2001 Arkansas General As- L. Rev. 493.

11-9-118. Provider payments while claims are pending.

(a) No hospital, physician, or other health care provider shall bill or attempt to collect any fee or any portion of a fee for services rendered to an employee due to a work-related injury or report to any credit reporting agency any failure of the employee to make the payment, when a claim for compensation has been filed under this chapter and the hospital, physician, or health care provider has received actual notice given in writing by the employee or the employee's representative. Actual notice shall be deemed received by the hospital, physician, or health care provider five (5) days after mailing by certified mail by the employee or his or her representative to the hospital, physician, or health care provider.

(b) The notice shall include:

- (1) The name of the employer;
- (2) The name of the insurer, if known;
- (3) The name of the employee receiving the services;
- (4) The general nature of the injury, if known; and
- (5) Where a claim has been filed, the claim number, if known.

(c) When an injury or bill is found to be noncompensable under this chapter, the hospital, physician, or other health care provider shall be entitled to pursue the employee for any unpaid portion of the fee or other charges for authorized services provided to the employee. Any applicable statute of limitations for an action for the fees or other charges shall be tolled from the time notice is given to the hospital, physician, or other health care provider until a determination of noncompensability in regard to the injury which is the basis of the services is made, or in the event that there is an appeal to the Workers' Compensation Commission, the Court of Appeals, or the Supreme Court, until a final determination of noncompensability is rendered and all appeal deadlines have passed.

(d) This section shall not avoid, modify, or amend any other section or subsection of this chapter, including, but not limited to, the prohibition against balanced billing contained in § 11-9-508(d)(3) and any rules and regulations adopted thereunder.

(e) An order by the commission pursuant to this section shall stay all proceedings for collection.

History. Acts 2001, No. 1281, § 3.

A.C.R.C. Notes. References to "this chapter" in §§ 11-9-101—11-9-116 may

not apply to this section which was enacted subsequently.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General Assembly, Labor Law, 24 U. Ark. Little Rock L. Rev. 493.

SUBCHAPTER 2 — WORKERS' COMPENSATION COMMISSION

SECTION.

- 11-9-201. Members — Appointment — Compensation.
- 11-9-202. Members — Bond.
- 11-9-203. Members — Removal.
- 11-9-204. Proceedings.
- 11-9-205. Administration of chapter — Staff and expenditures.
- 11-9-206. Traveling expenses for members and employees.

SECTION.

- 11-9-207. Powers and duties.
- 11-9-208. Biennial report.
- 11-9-209. Statistical data collection.
- 11-9-210. Purchase of annuity contracts — Funding of Death and Permanent Total Disability Trust Fund obligations.

Cross References. Jurisdiction over injury claims of state employees, § 19-10-402.

Effective Dates. Acts 1979, No. 663, § 4: Mar. 29, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is presently no authority for the appointment of a special member of the Arkansas Workers' Compensation Commission to serve on the Commission when a regular member is disqualified to participate in any matter before the Commission; that since the Commission is composed of only three members, it is in the best interest of all persons concerned that specific authority be provided for the appointment of a special member of the Commission to hear and participate in the determination of any matter before the Commission when a regular member is disqualified for any reason; that this Act is designed to accomplish this purpose and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1986 (2nd Ex. Sess.), No. 10, § 15: July 1, 1986. Emergency clause provided: "It is hereby found and determined by the

General Assembly that the increased benefits and improvements in the administration of the Workers' Compensation system in Arkansas is in the best interest of employees, employers, and the public in general; therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after July 1, 1986."

Acts 1991, No. 1060, § 16: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1991 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1991 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

RESEARCH REFERENCES

Am. Jur. 82 Am. Jur. 2d, Work. Comp., § 79. **C.J.S.** 100 C.J.S., Work. Comp., § 700 et seq.

Ark. L. Rev. Administrative Law in Arkansas, 4 Ark. L. Rev. 107.

11-9-201. Members — Appointment — Compensation.

(a)(1) The Workers' Compensation Commission shall consist of three (3) members appointed by the Governor for terms of six (6) years who shall devote their entire time to the duties of the commission and shall administer the provisions of this chapter.

(2) One (1) member shall be an attorney who has at least five (5) years' experience representing employers in workers' compensation matters or shall be a person who, on account of his or her previous vocation, employment, or affiliation, has had at least five (5) years of experience as an employer and can be classed as a representative of employers.

(3) One (1) member shall be an attorney who has at least five (5) years' experience predominantly representing claimants in workers' compensation matters or employees in labor relations matters or shall be a person who, on account of his or her previous vocation, employment, or affiliation, has had at least five (5) years of membership in a bona fide labor organization and can be classed as a representative of employees.

(4) The third member shall be an attorney, who shall be chair of the commission and who shall have been engaged in active practice of law in the State of Arkansas for not less than five (5) years next preceding the date of his or her appointment.

(b) Each member shall receive a salary of five thousand dollars (\$5,000) per annum or such other maximum salary as may be established by the Arkansas Constitution for salaries of state employees. The salaries shall be paid from the Workers' Compensation Fund and shall be paid in the manner as are salaries of other state officials or employees.

(c)(1) When any member of the commission is disqualified for any reason to hear and participate in the determination of any matter pending before the commission, the Governor shall appoint a qualified person to hear and participate in the decision on the particular matter. The special member so appointed shall have all authority and responsibility with respect to the particular matter before the commission as if the person were a regular member of the commission but shall have no authority or responsibility with respect to any other matter before the commission.

(2) A person appointed as a special member of the commission pursuant to the provisions of this subdivision shall be entitled to receive

a per diem not to exceed one hundred dollars (\$100) for each day spent in attending to his or her duties as a special member of the commission. The compensation shall be paid from any funds of the commission which are available for or may legally be used for paying such per diem.

History. Init. Meas. 1948, No. 4, § 42, Acts 1949, p. 1420; Acts 1979, No. 663, §§ 1, 2; A.S.A. 1947, §§ 81-1342 — 81-1342.2; Acts 1995, No. 546, § 1.

Publisher's Notes. This section may

be affected by Acts 1977, No. 113, which added a consumer representative to certain boards.

Cross References. Compensation of State Boards, § 25-16-901 et seq.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey—Workers' Compensation, 11 U. Ark. Little Rock L.J. 269.

CASE NOTES

ANALYSIS

Appointment.
Change in Position.
Quorum.

Appointment.

Although gubernatorial power of appointment is vested with a reasonable latitude of discretion in classifying the persons to be appointed to the commission, that discretion is not without limit or restraint; classification of appointees to commission must measure up to minimal legal standards. *Webb v. Workers' Comp. Comm'n*, 292 Ark. 349, 730 S.W.2d 222 (1987).

The manner in which commission members are chosen does not render this section unconstitutional. *Quinn v. Webb Wheel Prods.*, 59 Ark. App. 272, 957 S.W.2d 187 (1997), *aff'd*, 334 Ark. 573, 976 S.W.2d 386 (Ark. 1998).

Change in Position.

Where the Chairman of the Workers' Compensation Commission voted against the claimant in compensation case and later assumed the employer's position, there was no indication that this meant that he unfairly decided against the claimant. *Jones v. Scheduled Skyways, Inc.*, 1 Ark. App. 44, 612 S.W.2d 333 (1981).

Quorum.

By enacting subdivision (c)(1) of this section the legislature intended to create the mechanics for appointment of members to fill vacancies caused by disqualification but, in doing so, the legislature did not intend to modify, repeal, or alter the quorum provision of § 11-9-204; accordingly, where one commissioner disqualified himself prior to issuance of an opinion, the opinion issued by the remaining two commissioners was not invalid. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), superseded by statute as stated in, *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984) (decided under prior law).

Cited: *Georgia-Pacific Corp. v. Norsworthy*, 244 Ark. 399, 425 S.W.2d 320 (1968); *Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969); *Webb v. Workers' Comp. Comm'n*, 292 Ark. 349, 730 S.W.2d 222 (1987); *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988); *Clinton v. Clinton*, 305 Ark. 585, 810 S.W.2d 923 (1991); *Scarborough v. Cherokee Enterprises*, 306 Ark. 641, 816 S.W.2d 876 (1991); *Quinn v. Webb Wheel Prods.*, 52 Ark. App. 208, 915 S.W.2d 740 (1996).

11-9-202. Members — Bond.

(a) The members shall give bond in the sum of ten thousand dollars (\$10,000) executed by a surety company authorized to do business in the state for the faithful performance of their duties.

(b) The bond shall be approved by the Governor and kept on file in the office of the Secretary of State.

(c) Any action on the bond for breach thereof shall be instituted by the Attorney General and shall be in the name of the State of Arkansas.

(d) The premium upon the bonds shall be paid out of the Workers' Compensation Fund.

History. Init. Meas. 1948, No. 4, § 42, Acts 1949, p. 1420; A.S.A. 1947, § 81-1342.

A.C.R.C. Notes. The operation of subsection (c) of this section was suspended by adoption of a self-insured fidelity bond

program for public officers, officials and employees, effective July 20, 1987, pursuant to § 21-2-701 et seq. The subsection may again become effective upon cessation of coverage under that program. See § 21-2-703.

CASE NOTES

Cited: Georgia-Pacific Corp. v. Norsworthy, 244 Ark. 399, 425 S.W.2d 320 (1968); Dura Craft Boats, Inc. v. Daugherty, 247 Ark. 125, 444 S.W.2d 562 (1969);

Webb v. Workers' Comp. Comm'n, 292 Ark. 349, 730 S.W.2d 222 (1987); Loosey v. Osmose Wood Preserving Co., 23 Ark. App. 137, 744 S.W.2d 402 (1988).

11-9-203. Members — Removal.

(a) The Governor may, at any time, remove any member of the Workers' Compensation Commission for inefficiency, neglect of duty, or misconduct in office, giving him or her in advance a copy of the charges preferred and an opportunity of being publicly heard, in person or by counsel, upon not less than ten (10) days' notice.

(b) A representative of the Attorney General's office shall attend the proceedings and upon the Governor's request shall advise or assist him or her therein.

(c) Either party may procure the attendance of witnesses and their testimony as is now provided by the Civil Code in ordinary actions.

(d) If a member is removed, the Governor shall file in the office of the Secretary of State a complete statement of all charges made against the member and his or her findings, together with a complete record of the proceedings had and a transcript of testimony. It shall constitute a public record of the state.

History. Init. Meas. 1948, No. 4, § 42, Acts 1949, p. 1420; A.S.A. 1947, § 81-1342.

CASE NOTES

Cited: Georgia-Pacific Corp. v. Norsworthy, 244 Ark. 399, 425 S.W.2d 320 (1968); Dura Craft Boats, Inc. v. Daugherty, 247 Ark. 125, 444 S.W.2d 562 (1969);

Webb v. Workers' Comp. Comm'n, 292 Ark. 349, 730 S.W.2d 222 (1987); Loosey v. Osmose Wood Preserving Co., 23 Ark. App. 137, 744 S.W.2d 402 (1988).

11-9-204. Proceedings.

(a) Members of the Workers' Compensation Commission shall be considered as officers and shall take the oath prescribed by the Arkansas Constitution and the laws of Arkansas.

(b)(1) A majority of the commission shall constitute a quorum for the transaction of business, and vacancies shall not impair the right of the remaining members to exercise all the powers of the full commission, so long as a majority remains.

(2) Any investigation, inquiry, or hearing which the commission is authorized to hold or undertake may be held or undertaken by or before any one (1) member of the commission, or referee acting for him or her, under authorization of the commission.

(c)(1) The commission shall maintain and keep open, during reasonable business hours, an office in Little Rock, for the transaction of business, at which office its official records and papers shall be kept.

(2) The commission or any member of the commission may hold sessions and conduct hearings at any place within the state.

(d) The commission shall have a seal for authentication of its orders, awards, and proceedings, upon which shall be inscribed the words: "Workers' Compensation Commission, State of Arkansas".

History. Init. Meas. 1948, No. 4, § 42, Acts 1949, p. 1420; A.S.A. 1947, § 81-1342.

Cross References. Oath, Ark. Const., Art. 19, § 20.

CASE NOTES

ANALYSIS

Findings.
Quorum.
Validity.

Findings.

The commission is required to rule on constitutional questions that are properly before it in order to provide the appeals court with fact-findings sufficient to decide the constitutional issue. Green v. Smith & Scott Logging, 54 Ark. App. 53, 922 S.W.2d 746 (1996).

Quorum.

By enacting § 11-9-201(c)(1), the legislature intended to create the mechanics for appointment of members to fill vacan-

cies caused by disqualification but, in doing so, the legislature did not intend to modify, repeal, or alter the quorum provision of this section; accordingly, where one commissioner disqualified himself prior to issuance of an opinion, the opinion issued by the remaining two commissioners was not invalid. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982), superseded by statute as stated in, Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984) (decided under prior law).

Validity.

Official actions taken by a commissioner while serving as commissioner were legally valid and effectual notwithstanding the supreme court's subsequent determi-

nation that he was not qualified to serve. Thus commissioner's decision would be valid even though only one other commissioner participated in the decision. *Appleby v. Belden Corp.*, 22 Ark. App. 243, 738 S.W.2d 807 (1987).

Cited: *Georgia-Pacific Corp. v. Norsworthy*, 244 Ark. 399, 425 S.W.2d 320 (1968); *Dura Craft Boats, Inc. v. Daugh-*

erty, 247 Ark. 125, 444 S.W.2d 562 (1969); *Webb v. Workers' Comp. Comm'n*, 292 Ark. 349, 730 S.W.2d 222 (1987); *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988); *Southwest Ark. Dev. Council, Inc. v. Tidwell*, 95 Ark. App. 27, 233 S.W.3d 190 (2006); *Walker v. Cooper Auto.*, — Ark. App. —, 289 S.W.3d 184 (2008).

11-9-205. Administration of chapter — Staff and expenditures.

(a)(1) For the purpose of administering the provisions of this chapter, the Workers' Compensation Commission is authorized:

(A) To make such rules and regulations as may be found necessary;

(B) To appoint and fix the compensation of temporary technical assistants and medical and legal advisers and to appoint and to fix the compensation of clerical assistants and other officers and employees; and

(C) To make such expenditures, including those for personal service, rent, books, periodicals, office equipment, and supplies, and for printing and binding as may be necessary.

(2)(A) Prior to the adoption, prescription, amendment, modification, or repeal of any rule, regulation, or form, the commission shall give at least forty-five (45) days' notice of its intended action.

(B) The notice shall include a statement of the terms or substance of the intended action or description of the subjects and issues involved, and the time, place, and manner in which interested persons may present their views thereon.

(C) The notice shall be mailed to any person specified by law or who shall have requested advance notice of rule-making proceedings.

(3) The commission shall afford all interested persons a reasonable opportunity to submit written data, views, or arguments, and, if the commission in its discretion shall so direct, oral testimony or argument.

(4) Each rule, regulation, or form adopted by the commission shall be effective twenty (20) days after adoption unless a later date is specified by law or in the rule itself.

(5) All expenditures of the commission in the administration of this chapter shall be allowed and paid from the Workers' Compensation Fund upon the presentation of itemized vouchers approved by the commission.

(b)(1) The commission may appoint as many persons as may be necessary to be administrative law judges and in addition may appoint such examiners, rate experts, investigators, medical examiners, clerks, and other employees as it deems necessary to effectuate the provisions of this chapter, provided that the appointment of all rate experts shall be made by the Insurance Commissioner, whose duty it is to approve the rates charged.

(2) Rate experts shall be considered employees of the commission and the Insurance Commissioner and shall be paid from the Workers' Compensation Fund.

(3) Employees appointed pursuant to this subsection shall receive an annual salary to be fixed by the commission within the appropriation made therefor.

(c) It shall be the duty of an administrative law judge, under the rules adopted by the commission, to hear and determine claims for compensation and to conduct hearings and investigations and to make such orders, decisions, and determinations as may be required by any rule or order of the commission.

History. Init. Meas. 1948, No. 4, §§ 42, 1986 (2nd Ex. Sess.), No. 10, § 13; A.S.A. 44, Acts 1949, p. 1420; 1975, No. 655, § 1; 1947, §§ 81-1342, 81-1344.

RESEARCH REFERENCES

Ark. L. Rev. Leflar, Compensation for Work-Related Illness in Arkansas, 41 Ark. L. Rev. 89.

CASE NOTES

ANALYSIS

In General.

Dismissal of Claim.

In General.

Commission must administer its rules subject to basic rules of fair play. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988).

Dismissal of Claim.

Section 11-9-702(a)(4) grants the Commission authority to dismiss a claim without prejudice; under the authority granted by subdivision (a)(1)(A) of this section, the Commission has promulgated a rule which provides that if a party requests

that a claim be dismissed for want of prosecution, the Commission may dismiss the claim with prejudice. *Johnson v. Triple T Foods*, 55 Ark. App. 83, 929 S.W.2d 730 (1996).

Cited: *Georgia-Pacific Corp. v. Norsworthy*, 244 Ark. 399, 425 S.W.2d 320 (1968); *Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969); *Webb v. Workers' Comp. Comm'n*, 292 Ark. 349, 730 S.W.2d 222 (1987); *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988); *Harrington Constr. Co. v. Williams*, 45 Ark. App. 126, 872 S.W.2d 426 (1994); *Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

11-9-206. Traveling expenses for members and employees.

Any member or employee of the Workers' Compensation Commission shall be entitled to receive his or her necessary traveling expenses actually incurred and for subsistence while traveling on official business and away from his or her designated station. The expenses shall be certified by the person who incurred them and shall be allowed and paid upon presentation of vouchers approved by the commission.

History. Init. Meas. 1948, No. 4, § 45, Acts 1949, p. 1420; A.S.A. 1947, § 81-1346.

Cross References. Compensation of State Boards, § 25-16-901 et seq.

11-9-207. Powers and duties.

(a) In addition to its other duties and powers, the Workers' Compensation Commission is given and granted full power and authority:

(1) To hear and determine all claims for compensation, including claims based upon injuries which occurred outside the State of Arkansas for which compensation is payable under this chapter;

(2) To require and order medical services for and examinations of injured employees and to employ special medical examiners and advisors who shall be paid not to exceed twenty-five dollars (\$25.00) per day and reasonable traveling expenses;

(3) To approve claims for medical services and attorney's fees;

(4) To excuse failure to give notice either of injury or death of any employee;

(5) To approve agreements, make, modify, or rescind awards, and make and enter findings of fact and rulings of law;

(6) To enter orders in appealed cases;

(7) To determine the time for the payment of compensation and order the reimbursement of employers for amounts advanced;

(8) To assess penalties;

(9) To prescribe rules and regulations governing the representation of employees, employers, and carriers in respect to claims before the commission;

(10) To issue subpoenas, administer oaths, and take testimony, by deposition or otherwise;

(11) To make surveys and to determine the existence and prevalence of occupational disease hazards within this state, to determine the measures necessary to eliminate or reduce these hazards, and to add to the schedule of occupational diseases subject to appropriate conditions and after public hearing;

(12) To make available all records in connection with all cases of personal injury to the Director of the Department of Labor. The director may propose rules for the prevention of injuries and transmit the rules to the commission. The commission may recommend proposed rules for prevention of injuries to the director;

(13) To have and exercise all other powers and duties conferred or imposed by this chapter; and

(14) To transfer the excess of income over expenses from the commission's annual educational conference to Kids' Chance of Arkansas, Inc., a nonprofit charitable organization designed to provide scholarships to children of workers who have been killed or become permanently and totally disabled from a compensable injury, including any accumulation from prior years' conferences.

(b)(1) In addition to the other powers and duties granted to the commission in this section and otherwise provided by law, the commission is authorized to establish and impose reasonable fees to recover the cost of preparation of various informative materials distributed by the commission.

(2) The fees shall be established by regulation of the commission.

(3) Funds derived from fees shall be deposited into the Workers' Compensation Fund to be used to defray expenses incurred in preparation and distribution of materials.

History. Init. Meas. 1948, No. 4, § 43, Acts 1949, p. 1420; Acts 1981, No. 630, § 1; A.S.A. 1947, §§ 81-1343, 81-1343.1; Acts 2001, No. 1757, § 3.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill

2646 of 2001."

Acts 2001, No. 1757, § 12, provided: "All laws and parts of laws expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999."

Publisher's Notes. The schedule of occupational diseases referred to in subdivision (a)(11) appears to have been eliminated by the 1976 amendment to § 11-9-602.

RESEARCH REFERENCES

Ark. L. Rev. Leflar, Compensation for Work-Related Illness in Arkansas, 41 Ark. L. Rev. 89.

CASE NOTES

ANALYSIS

Appeals.
Constitutional Issues.
Coverage Determination.
Findings.
Findings.
Jurisdiction over Carrier.
Lump-Sum Settlements.
Overpayment of Benefits.
Remand.

Appeals.

Where the law judge reserved his ruling on the permanent disability issue, the Workers' Compensation Commission could not conduct a de novo review until the law judge had heard and decided that issue. *Wooten v. Arkansas Aluminum Window & Door, Inc.*, 17 Ark. App. 209, 706 S.W.2d 198 (1986).

Although the commission has the statutory authority to require that parties specify all the issues to be presented for review, it also has the statutory duty to decide the issues before it on the basis of the record as a whole and to decide the facts de novo. *Wilson v. Cargill, Inc.*, 45 Ark. App. 174, 873 S.W.2d 171 (1994).

The Arkansas Workers' Compensation Commission is not an appellate court; it is, instead, the fact finder, and as such has

a duty and statutory obligation to make specific findings of fact on de novo review based on the record as a whole, and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. *Wilson v. Cargill, Inc.*, 45 Ark. App. 174, 873 S.W.2d 171 (1994).

Constitutional Issues.

Constitutional issues must be raised before the Commission in order to preserve them for appeal, and the Commission is required to rule on constitutional questions that are properly before it. *Jefferson v. Munsey Prods., Inc.*, 55 Ark. App. 105, 930 S.W.2d 396 (1996).

Coverage Determination.

The Workers' Compensation Commission had jurisdiction to decide whether there was a Workers' Compensation policy in force at the time of the injury of farmworker and whether the worker was an employee. *Southern Farm Bureau Cas. Ins. Co. v. Tuggle*, 270 Ark. 106, 603 S.W.2d 452 (1980).

The commission has jurisdiction to pass upon questions relating to Workers' Compensation insurance policy when ancillary to the determination of the claimant's

rights, including the coverage and its extent. *Great Cent. Ins. Co. v. Mel's Texaco*, 8 Ark. App. 236, 651 S.W.2d 101 (1983).

Where a third-party tort action was filed against a company based on the allegation that claimant was a special employee of the company, in granting a writ of prohibition the Court implicitly held that the special employee issue was to be decided by the Arkansas Workers' Compensation Commission as it had exclusive, original jurisdiction to determine the applicability of the Arkansas Workers' Compensation Act. *Nucor Corp. v. Rhine*, 366 Ark. 550, 237 S.W.3d 52 (2006).

Findings.

The commission is required to rule on constitutional questions that are properly before it in order to provide the appeals court with fact-findings sufficient to decide the constitutional issue. *Green v. Smith & Scott Logging*, 54 Ark. App. 53, 922 S.W.2d 746 (1996).

Findings.

Workers' Compensation Commission's decision affirming the administrative law judge's finding that an employee was entitled to permanent anatomical impairment was reversed and remanded where the commission failed to make the specific findings of fact necessary for the reviewing court to carry out a meaningful review of issues relating to whether the employee's injury was the major cause of his impairment, the permanency of the employee's condition, the assessment of the medical evidence, and the employee's impairment rating. *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

Arkansas Workers' Compensation Commission had full authority under subdivision (a)(5) of this section to make a determination as to which one of two employers the employee was working for at the time of the accident. *Johnson v. Bonds Fertilizer, Inc.*, 365 Ark. 133, 226 S.W.3d 753 (2006).

Jurisdiction over Carrier.

Jurisdiction of the commission over the employer also gave it jurisdiction over the insurance carrier. *Southern Farm Bureau Cas. Ins. Co. v. Tuggle*, 270 Ark. 106, 603 S.W.2d 452 (1980).

Lump-Sum Settlements.

The Workers' Compensation Commission is granted broad discretionary pow-

ers in approving lump-sum settlements and unless that discretion was abused or substantial evidence was lacking, its decisions will not be overturned on review. *Stiles v. Reynolds Metals Co.*, 263 Ark. 321, 564 S.W.2d 520 (1978).

Even though claimant, who desired lump-sum settlement, wisely invested his money, it was not an abuse of discretion for Workers' Compensation Commission to deny the settlement. *Stiles v. Reynolds Metals Co.*, 263 Ark. 321, 564 S.W.2d 520 (1978).

Overpayment of Benefits.

Arkansas Workers' Compensation Commission did not err in approving a three-percent offset for overpayment of a claimant's permanent anatomical impairment rating to the insurer against the claimant's future benefits because the Commission had the full power and authority under subdivision (a)(7) of this section to order the reimbursement of employers for amounts advanced and because sound policy reasons existed for awarding credit for an overpayment of benefits. *Maulding v. Price's Util. Contrs., Inc.*, 2009 Ark. App. 776, 358 S.W.3d 915 (2009), rehearing denied, 2010 Ark. App. 51, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 222 (Apr. 22, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 227 (Apr. 22, 2010).

Remand.

The commission is authorized to take testimony by deposition or other means under subdivision (a)(10) or to remand the matter to the judge for the purpose of taking additional evidence under § 11-9-704(b)(7). *Quinn v. Webb Wheel Prods.*, 52 Ark. App. 208, 915 S.W.2d 740 (1996).

Cited: *Ward Furn. Mfg. Co. v. Reather*, 234 Ark. 151, 350 S.W.2d 691 (1961); *Tri State Ins. Co. v. Employers Mut. Liab. Ins. Co.*, 254 Ark. 944, 497 S.W.2d 39 (1973); *Mohawk Rubber Co. v. Buford*, 259 Ark. 614, 535 S.W.2d 819 (1976); *Wallis v. Whirlpool Corp.*, 12 Ark. App. 101, 671 S.W.2d 760 (1984); *Webb v. Workers' Comp. Comm'n*, 286 Ark. 399, 692 S.W.2d 233 (1985); *Thornton v. Bruce*, 33 Ark. App. 31, 800 S.W.2d 723 (1990); *TEC v. Falkner*, 38 Ark. App. 13, 827 S.W.2d 661 (1992).

11-9-208. Biennial report.

On or before the first day of the regular session of the General Assembly, the Workers' Compensation Commission under the authority of at least two (2) of its members shall make to the Governor and to the General Assembly a report of the administration of this chapter for the preceding biennial period, together with such recommendations as the commission may deem advisable.

History. Init. Meas. 1948, No. 4, § 46, Acts 1949, p. 1420; A.S.A. 1947, § 81-1347.

11-9-209. Statistical data collection.

(a) The Workers' Compensation Commission shall publish annually, on an aggregate basis, information pertaining to the distribution of workers' compensation insurance premiums, losses, expenses, and net income to be compiled from reports required to be filed with the Insurance Commissioner pursuant to § 23-63-216, as amended, or any similar information required to be filed by the Insurance Commissioner regarding workers' compensation insurance.

(b) The commission shall also publish in that same annual report information regarding aggregate workers' compensation benefit distribution to claimants, medical providers, and attorneys if that specific information or similar information becomes available from revised or additional reporting requirements that may be required by the Insurance Commissioner.

History. Acts 1991, No. 1060, § 7.

11-9-210. Purchase of annuity contracts — Funding of Death and Permanent Total Disability Trust Fund obligations.

(a)(1) The Workers' Compensation Commission is hereby authorized to fund financial obligations of the Death and Permanent Total Disability Trust Fund through the purchase of structured annuity contracts. Provided, the commission shall purchase such annuity contracts only when the commission determines that it is financially advantageous to the trust fund involved.

(2) Structured annuity contracts shall be purchased only from insurance companies:

(A) Licensed to do business in Arkansas and authorized to write annuities as regulated by the State Insurance Department;

(B) Experienced in the business of writing and administering structured annuities;

(C) Determined to be financially sound and having an A.M. Best rating of A+ and category size VIII or greater, or equivalent independent industry rating; and

(D) Be rated AA+ or better by Standard and Poor's, Moody's, or an equivalent rating by an equivalent rating service.

(3) Structured annuity contracts purchased by the commission shall:

(A) Include a separate contract for each claimant or beneficiary covered;

(B) Require that the payments to the claimant or beneficiary be sent to the commission so that it can maintain administrative control over the payments, and the commission will distribute the payments in full to the claimants or beneficiaries; and

(C) Provide for return of principal to the appropriate fund in the event that the obligations of the Death and Permanent Total Disability Trust Fund to any claimant or beneficiary cease prior to the end of the period certain guarantee in the contract.

(b) The commission shall adopt such appropriate rules and regulations consistent with the provisions of this section and §§ 23-96-104O(2) and X(2) and 23-96-114F and G as it deems necessary to enable it to efficiently and effectively administer the provisions of this section and §§ 23-96-104O(2) and X(2) and 23-96-114F and G and any structured annuity arrangement it may enter into pursuant to the authority granted herein.

History. Acts 1991, No. 651, §§ 1, 3.

SUBCHAPTER 3 — FUNDS — TAXES AND FEES

SECTION.

11-9-301. Funds established.

11-9-302. Qualifying fees for carriers, third-party administrators, and self-insurers.

11-9-303. Payment of tax by carrier.

11-9-304. Payment of tax by self-insurer.

11-9-305. Payment of tax by public employer.

SECTION.

11-9-306. Determination of surplus and rate of taxation.

11-9-307. Certification of cost of administering Public Employee Claims Division.

Effective Dates. Acts 1979, No. 253, § 12: Mar. 2, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain provisions of the Worker's Compensation law are in urgent need of revision to more clearly define the benefits to be provided by Worker's Compensation coverage; that this Act is designed to provide such clarification and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1983, No. 393, § 2: Mar. 10, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that passage of this Act is necessary to enable the Workers' Compensation Commission to fully discharge the financial obligations of the State of Arkansas by providing additional revenue generating potential within current statutory taxation authority. Further, it is also determined that the only acceptable method for assuring payment of benefits under the workers' compensation law pertaining to death and permanent total disability payments is to change the procedure for assessment and collection of premium and

self-insurers' taxes. Therefore an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, and the continued solvency of the Workers' Compensation Fund, the Second Injury Trust Fund, and the Death and Permanent Total Disability Trust Fund, shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 98, § 13: July 1, 1985. Emergency clause provided: "It is hereby found and determined by the Seventy-Fifth General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1985 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1985 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after July 1, 1985."

Acts 1987, No. 680, § 20: July 1, 1987. Emergency clause provided: "It is hereby found and determined by the Seventy-Sixth General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two year period; that the effectiveness of this Act on July 1, 1987 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1987 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1987."

Acts 1989 (3rd Ex. Sess.), No. 22, § 10: Nov. 6, 1989. Emergency clause provided:

"It is hereby found and determined by the Seventy-Seventh General Assembly, meeting in Third Extraordinary Session, that the current funding of the Arkansas Insurance Department is inadequate; that additional funds are immediately necessary to finance the collection of workers' compensation premium taxes by the Insurance Department; and further that this act will provide additional needed funds to the State Insurance Department. Therefore, an emergency is hereby declared to exist and this Act being necessary for the public peace, health and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1993, No. 652, § 18: Mar. 24, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly of the State of Arkansas that current revenues supporting the operation and activities of the Arkansas Insurance Department are insufficient for efficient and productive operation of the Insurance Department in view of its myriad duties to protect the insurance-buying consumers of this State and to regulate the Arkansas activities of insurers, insurance agents and similar licensees, and professional bail bond companies. The provisions of this Act are essential to the operations of the Arkansas Insurance Department and delay in the effective date of this Act could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 1318, § 19: Apr. 20, 1993. Emergency clause provided: "It is hereby found and determined by the Seventy-Ninth General Assembly, that the Workers' Compensation System is in dire need of change which will require budgetary increases to the Arkansas Workers' Compensation Commission to effectively manage the changes to the workers' compensation law. An emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect upon approval and signature by the Governor."

RESEARCH REFERENCES

Am. Jur. 82 Am. Jur. 2d, Work. Comp., § 59 et seq. **C.J.S.** 100 C.J.S., Work. Comp., § 646 et seq.

11-9-301. Funds established.

(a) There are established on the books of the Treasurer of State, the Auditor of State, and the Chief Fiscal Officer of the State, three (3) separate funds:

- (1) The "Workers' Compensation Fund";
- (2) The "Second Injury Trust Fund"; and
- (3) The "Death and Permanent Total Disability Trust Fund".

(b) Except for funds transferred into the General Revenue Fund Account specified in § 11-9-303(c) or other sections of this subchapter, no money shall be appropriated from these funds for any purpose except for the use and benefit, or at the direction of, the Workers' Compensation Commission.

(c) All funds established pursuant to this section shall be administered, disbursed, and invested under the direction of the commission.

(d) All incomes derived through investment of the Workers' Compensation Fund, the Second Injury Trust Fund, and the Death and Permanent Total Disability Trust Fund shall be credited, as investment income, to the fund that participated in the investment. For the purpose of investment, Workers' Compensation Fund moneys shall be invested in accordance with the State Treasury Management Law, § 19-3-501 et seq.

(e) Except for moneys transferred into the General Revenue Fund Account specified in § 11-9-303(c) or other sections of this subchapter, all moneys deposited to the aforementioned funds shall not be subject to any deduction, tax, levy, or any other type of assessment.

(f) If, on or after July 1, 1983, the balance in the Second Injury Trust Fund becomes insufficient to fully compensate those employees to whom it is obligated, payment shall be suspended until such time as the Second Injury Trust Fund is capable of meeting its obligations, paying all arrearages, and restoring normal benefit payments. In no event shall there be any reverter of responsibility to the employer or carrier on or after July 1, 1983.

(g)(1) Upon the effective maturity dates of each investment, the investment shall be transferred to the Treasurer of State for deposit into the Death and Permanent Total Disability Trust Fund created in this section.

(2) The free balances of the Death and Permanent Total Disability Bank Fund shall be transferred to the Death and Permanent Total Disability Trust Fund.

History. Init. Meas. 1948, No. 4, § 47, Acts 1949, p. 1420; Acts 1979, No. 253, § 10; 1981, No. 290, § 13; 1983, No. 393, § 1; A.S.A. 1947, § 81-1348; Acts 1989 (3rd Ex. Sess.), No. 22, §§ 1, 2; 1997, No. 1179, § 8.

Cross References. Death and Permanent Total Disability Trust Fund, § 19-5-925.

Second Injury Trust Fund, § 19-5-911.

Workers' Compensation Fund, § 19-5-924.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey—Workers' Compensation, 11 U. Ark. Little Rock L.J. 269.

CASE NOTES

Second Injury Trust Fund.

It is not a violation of due process for the Workers' Compensation Commission to decide cases involving the Second Injury Jury Trust Fund. *Lambert v. Baldor Elec.*, 44 Ark. App. 117, 868 S.W.2d 513 (1993).

Any consideration of the Second Injury Trust Fund's solvency is inappropriate

where a claimant is entitled to benefits from the fund. *Stucco Plus v. Rose*, 327 Ark. 314, 938 S.W.2d 556 (Ark. 1997).

Cited: *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

11-9-302. Qualifying fees for carriers, third-party administrators, and self-insurers.

(a) Each carrier writing compensation insurance in this state shall pay to the Insurance Commissioner, in addition to the premium taxes and fees now required under existing laws, at the time of securing the first license to transact business in the state the sum of five hundred dollars (\$500) for the privilege of qualifying with the Workers' Compensation Commission for the writing of compensation insurance.

(b) At the time of qualifying, each self-insurer or third-party administrator shall pay to the commission the sum of one hundred dollars (\$100) for the privilege of qualifying as a self-insurer or third-party administrator.

(c) All carriers, self-insurers, or third-party administrators qualifying under the provisions of this chapter shall be required to pay this initial assessment before they shall be qualified.

(d) These fees shall be deposited into the Workers' Compensation Fund created in § 11-9-301.

(e) The commission may assess a third-party administrator an annual fee of one hundred dollars (\$100).

History. Init. Meas. 1948, No. 4, § 47, Acts 1949, p. 1420; Acts 1979, No. 253, § 10; 1983, No. 393, § 1; A.S.A. 1947, § 81-1348; Acts 2001, No. 1757, § 4.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993.

Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Acts 2001, No. 1757, § 12, provided: "All laws and parts of laws expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999."

CASE NOTES

Cited: Franklin Collier Farms v. Chapple, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

11-9-303. Payment of tax by carrier.

(a) In addition to the premium taxes collected from carriers, the carriers shall pay annually to the Workers' Compensation Commission a tax, at the rate to be determined as provided in § 11-9-306 but not to exceed three percent (3%), on all written manual premiums resulting from the writing of workers' compensation insurance on risks within the state.

(b) "Written manual premium" means premium produced in a given year by the manual rates in effect during the experience period and shall exclude the premium produced by the expense constant. Furthermore, "written manual premium", for the purpose of this chapter, means premium before any allowable deviated discounts, any experience rating modification, any premium discount, any reinsurance or deductible arrangement as common with fronting carriers, any dividend consideration, or other trade discount.

(c)(1) This tax shall be collected by the commission from the carriers at the same time and in the same manner as insurance premium taxes under § 26-57-601 et seq. and deposited into the funds created in § 11-9-301.

(2) This transfer from the funds created in § 11-9-301 shall be in the same proportions that deposits were made into the three (3) funds as set forth in § 11-9-306(a)-(c).

(d)(1) Assessments upon which premium taxes are based shall be made on forms prescribed by the commission and shall be paid to the commission.

(2) Absent a waiver obtained from the commission for good cause, the failure of the licensed carrier to pay the assessment when due shall be referred to the Insurance Commissioner for appropriate administrative action against the Arkansas certificate of authority of the delinquent insurer.

(e) Premium tax payments shall be made by check payable to the commission.

History. Init. Meas. 1948, No. 4, § 47, Acts 1949, p. 1420; Acts 1979, No. 253, § 10; 1983, No. 393, § 1; A.S.A. 1947, § 81-1348; Acts 1989 (3rd Ex. Sess.), No. 22, § 3; 1993, No. 652, § 14; 2001, No. 1757, § 5; 2005, No. 505, § 1.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall im-

pliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Acts 2001, No. 1757, § 12, provided: "All laws and parts of laws expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999."

CASE NOTES

Cited: Franklin Collier Farms v. Chapple, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

11-9-304. Payment of tax by self-insurer.

(a) It shall be the duty of the Workers' Compensation Commission to collect a tax from every self-insured employer at a rate to be determined as provided by § 11-9-306 but not to exceed three percent (3%) of the written manual premium which would have to be paid under § 11-9-303 by a carrier if the self-insured employer were insured by a carrier.

(b) If the tax provided for under this section is not paid within thirty (30) days of the date provided in § 11-9-306, there shall be assessed a penalty for each thirty (30) days the amount so assessed remains unpaid which is equal to ten percent (10%) of the unpaid amounts and which shall be collected at the same time as a part of the tax assessed.

History. Init. Meas. 1948, No. 4, § 47, § 10; 1983, No. 393, § 1; A.S.A. 1947, Acts 1949, p. 1420; Acts 1979, No. 253, § 81-1348.

CASE NOTES

Cited: Franklin Collier Farms v. Chapple, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

11-9-305. Payment of tax by public employer.

(a)(1) It shall be the duty of the Workers' Compensation Commission to collect a tax from every public employer providing workers' compensation coverage to its employees at a rate to be determined as provided by § 11-9-306 but not to exceed three percent (3%) of the written manual premium which an insurance carrier would have to pay under § 11-9-303 if the public employer were insured by a carrier.

(2)(A) The commission shall tabulate and collect the tax to be collected from entities whose workers' compensation claims are administered by the Public Employee Claims Division.

(B) In tabulating the manual premium, a public employer whose workers' compensation claims are administered by the division shall use the average compensation rate for this state as promulgated by the National Council on Compensation Insurance, Inc. for the tax year in question.

(3) The tax collected shall be deposited in and paid to the commission from the Workers' Compensation Revolving Fund and miscellaneous revolving funds.

(b)(1) In the event that any public employer whose workers' compensation claims are administered by the division fails to cooperate in furnishing information upon which the tax will be computed or fails to pay the tax within thirty (30) days of the date provided in § 11-9-306,

the commission shall notify the Director of the Public Employee Claims Division of the failure, and the commission shall decertify the public employer from participation in the state's workers' compensation program.

(2) In the event of decertification, the public employer shall obtain its employer's workers' compensation liability coverage from the private market and shall not be entitled to participate in the state's workers' compensation program for a period of one (1) year thereafter.

(c) The procedure for decertification shall be the same as for the revocation or termination of the self-insurer privilege.

History. Init. Meas. 1948, No. 4, § 47, 1348; Acts 1989 (3rd Ex. Sess.), No. 22, Acts 1949, p. 1420; Acts 1983, No. 393, § 4; 1993, No. 1318, § 12; 2005, No. 505, § 1; 1985, No. 98, § 10; A.S.A. 1947, § 81- § 2.

CASE NOTES

Legislative Power.

The objects of the taxation in this section are municipalities and counties which are entities created by the state; as such, the legislature was acting well within its power when it imposed this tax.

County of Howard v. Rotenberry, 286 Ark. 29, 688 S.W.2d 937 (1985).

Cited: Franklin Collier Farms v. Chapple, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

11-9-306. Determination of surplus and rate of taxation.

(a)(1) The Workers' Compensation Commission, on or before December 31 of each year, shall determine the surplus, if any, in the Workers' Compensation Fund, together with the additional amounts necessary to properly administer this chapter for the ensuing year.

(2) The commission shall determine the rate of taxation for collections for that year on or before March 1 of the following year.

(b)(1) The commission, on or before December 31 of each year, shall determine the surplus, if any, in the Second Injury Trust Fund, together with the additional amounts necessary to properly administer this chapter for the ensuing year.

(2) The commission shall determine the rate of taxation for collections for that year on or before March 1 of the following year.

(c)(1) The commission, on or before December 31 of each year, shall determine the surplus, if any, in the Death and Permanent Total Disability Trust Fund, together with the additional amounts necessary to properly administer this chapter for the ensuing year.

(2) The commission shall determine the rate of taxation for collections for that year on or before March 1 of the following year.

(d) The total rate of taxation for all three (3) funds when added together shall not exceed three percent (3%).

(e)(1) The commission shall notify each insurance carrier of the rate of taxation applicable to each fund for the preceding year, and taxes shall be computed and paid pursuant to the provisions of § 11-9-303(c) on or before April 1 of the following year.

(2) The commission shall notify each self-insured employer subject to the tax of the rate of taxation applicable to each fund for the preceding year, and taxes shall be computed by the commission and paid to each fund by the self-insurer through payments made directly to the commission on or before April 1 of the following year.

(3) The commission shall notify each public employer subject to this tax of the rate of taxation applicable to each fund for the preceding year, and taxes shall be computed by the commission and paid to each respective fund through payments made directly to the commission by the public employer on or before April 1 of the following year.

(f) The commission shall have the authority to promulgate rules or regulations for administration of the assessment and tax collection process, including, but not limited to, rules and regulations applicable to the funds established in § 11-9-301.

(g) No later than March 30 each year, the commission shall provide the Insurance Commissioner a complete listing of workers' compensation premium tax collections for the preceding calendar year, including the monetary amount of workers' compensation premium tax paid, by year, by name of workers' compensation carrier, and by National Association of Insurance Commissioners identity number.

History. Init. Meas. 1948, No. 4, § 47, § 81-1348; Acts 1989 (3rd Ex. Sess.), No. Acts 1949, p. 1420; Acts 1979, No. 253, § 22, § 5; 2005, No. 505, § 3. § 10; 1983, No. 393, § 1; A.S.A. 1947,

CASE NOTES

Cited: Franklin Collier Farms v. Chapple, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

11-9-307. Certification of cost of administering Public Employee Claims Division.

(a) During the biennial period beginning July 1, 1989, and thereafter, the State Insurance Department shall certify to the Chief Fiscal Officer of the State the cost of administering the Public Employee Claims Division.

(b) The certification shall be made the month following each quarter of the fiscal year and shall include a report of the expenditures of the division for workers' compensation claims paid on behalf of the cities, the counties, and the public schools, each of the three (3) reported as a class of employers, and each state agency supported from treasury funds or fund accounts.

(c) After the certification has been received and approved by the Chief Fiscal Officer of the State, the Chief Fiscal Officer of the State shall transfer funds from the Public School Fund, the Municipal Aid Fund, the County Aid Fund, and from the various treasury funds of state agencies to the Miscellaneous Agencies Fund Account.

(d) The transfers shall be made in the same proportion that payments were made in behalf of that entity for workers' compensation claims in the prior quarter as certified by the department.

(e) The amount transferred shall be the proportional cost associated with the fund as certified to and approved by the Chief Fiscal Officer of the State.

(f) Should a state agency be supported from more than one (1) treasury fund, the fund transfers from that agency shall be in the same proportion that appropriations were made to that agency for regular salaries from the respective funds.

History. Acts 1987, No. 680, § 16; 2011, No. 980, § 3.

deleted "Services" preceding "Fund Account" in (c).

Amendments. The 2011 amendment

SUBCHAPTER 4 — EMPLOYER LIABILITY — INSURANCE

SECTION.

- 11-9-401. Employer's liability for compensation.
- 11-9-402. Liability of prime contractors and subcontractors — Sole proprietorships or partnerships.
- 11-9-403. Waiver of exclusion or exemption.
- 11-9-404. Security for compensation.
- 11-9-405. Substitution of carrier for employer.

SECTION.

- 11-9-406. Failure to secure payment of compensation — Penalty.
- 11-9-407. Posting notice of compliance.
- 11-9-408. Insurance policies.
- 11-9-409. Safety and health loss control consultative services.
- 11-9-410. Third-party liability.
- 11-9-411. Effect of payment by other insurers.

Effective Dates. Acts 1975 (Extended Sess., 1976), No. 1227, § 21: Feb. 13, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that the welfare of both employer and employee is of primary interest and concern to the State of Arkansas; that the maximum benefits presently payable under the Workers' Compensation law are inadequate due to the steadily increasing cost of living and should be increased immediately to meet said increase in the cost of living; that certain other provisions should be clarified or modified, and that it is in the best interest of both employers and employees that this be accomplished as soon as possible. Therefore, an emergency is hereby declared to exist and this Act, being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 72, § 3: Feb. 16, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Worker's Compensation Commission should have the flexibility of establishing the amount of deposit or surety bond to be required in order to satisfy the Commission that a group self-insurer has the ability to meet its liabilities under the Worker's Compensation law; that the present law does not provide such flexibility and that this Act is immediately necessary to so provide. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 806, § 3: Apr. 8, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that the indemnity bond, surety

bond or security requirements necessary in order to obtain the status of a self-insured entity for municipalities, counties, or the State of Arkansas and its political subdivisions are unduly burdensome. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 941, § 4: Apr. 13, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that under the Workers' Compensation Law, sole proprietorship and partnership may elect to cover the sole proprietor and partners under the Workers' Compensation Law; that when the sole proprietorships or partnerships fail to make that election, the prime contractors' Workers' Compensation insurance carriers are including the prime contractors' payments to the sole proprietor and partners in computing the premium for the prime contractors' Workers' Compensation coverage even though the carrier does not provide coverage for those sole proprietors or partners; that such occurrences are inequitable and fundamentally unfair; that this Act prohibits such unfair treatment of prime contractors; and that the inequity will continue until this Act becomes effective; therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 980, § 3: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that certified audited financial statements of members of self-insured groups are not necessary after initial formation of the group, are burdensome and add unnecessary expense, and that an acceptable quality of financial statements can be obtained through other means. Many members of existing self-insured groups will be forced to withdraw from such groups unless present law which may be deemed to require certified audited statements is changed. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the public peace, health and safety, shall be in

force and effect from and after its passage and approval."

Acts 1987, No. 1015, § 21: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1227 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1991, No. 561, § 5: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the workers' compensation risk pool is being transferred by this Act from the Workers' Compensation Commission to the Insurance Department; that the transfer should become effective at the beginning of the next fiscal year in order to comport with the appropriations for the next fiscal year for the Workers' Compensation Commission and the Insurance Department; that this Act may not go into effect on July 1, 1991 unless this emergency clause is adopted. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

Acts 1993, No. 796, § 41: July 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Workers' Compensation Law is in immediate need of substantial revision; that this act accomplishes immediate revision; and that this act shall go into effect as soon as is practical which is determined to be July 1, 1993; and that unless this emergency clause is adopted, this act will not go into effect until after July 1, 1993. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1993. Furthermore, the provisions of this act shall apply only to injuries which occur after July 1, 1993."

Acts 1995, No. 825, § 14: Mar. 29, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that many of the small business operators of the state of Arkansas are currently being forced to pay excessive rates to provide workers compensation insurance for their employees and that the immediate passage of this act is necessary to grant them relief and to continue coverage for their employees. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect on and after its passage."

Acts 2003, No. 468, § 3 [2]: Mar. 18, 2003. Emergency clause provided: "It is found and determined by the General As-

sembly of the State of Arkansas that the financial well being of self-insured employers in this state is unduly burdened by the requirement to obtain excess insurance; and that this act is immediately necessary to relieve that burden. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Workers' compensation immunity as extending to one owning controlling interest in employer corporation. 30 A.L.R.4th 948.

Workers' compensation liability of successive employers for disease or condition allegedly attributable to successive employments. 34 A.L.R.4th 958.

Third-party tortfeasor's right to have damages recovered by employee reduced by amount of employee's workers' compensation benefits. 43 A.L.R.4th 849.

Workers' compensation law as precluding employee's suit against employer for third person's criminal attack. 49 A.L.R.4th 926.

Third-party tort liability of corporate officer to injured workers, 76 A.L.R.4th 365.

Ownership interest in employer business as affecting status as employee for workers' compensation purposes, 78 A.L.R.4th 973.

Right of workers' compensation insurer or employer paying to workers' compensation fund, on the compensable death of an

employee with no dependents, to indemnity or subrogation from proceeds or wrongful death action brought against third-party tortfeasor, 7 A.L.R.5th 969.

Uninsured and underinsured motorist coverage, validity, construction, and effect of policy provision purporting to reduce coverage by amount paid or payable under workers' compensation, 31 A.L.R.5th 116.

Right of employer or workers' compensation carrier to lien against or reimbursement out of uninsured or underinsured motorist proceeds payable to employee injured by third party, 33 A.L.R.5th 587.

Am. Jur. 82 Am. Jur. 2d, Work. Comp., § 223 et seq.

82 Am. Jur. 2d, Work. Comp., §§ 228 et seq., 464 et seq.

Ark. L. Rev. Copeland, The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?, 47 Ark. L. Rev. 1.

C.J.S. 99 C.J.S., Work. Comp., § 288 et seq.

100 C.J.S., Work. Comp., § 353 et seq.

CASE NOTES

Purpose.

Workers' compensation insurance has the salutary purpose of protecting employees, employers, and the public by providing a means by which injured workers may be compensated during the period of

their inability to work caused by the injury so that they may continue to exist and feed their families. The public is protected because, hopefully, this prevents injured workers from becoming wards of the state maintained at the expense of the

public. Wal-Mart Stores, Inc. v. Crist, 664 F. Supp. 1242 (W.D. Ark. 1987), rev'd, 855 F.2d 1326 (8th Cir. Ark. 1988).

11-9-401. Employer's liability for compensation.

(a)(1) Every employer should secure compensation to its employees and pay or provide compensation for their disability or death from compensable injury arising out of and in the course of employment without regard to fault as a cause of the injury.

(2) There shall be no liability for compensation under this chapter where the injury or death was substantially occasioned by the willful intention of the injured employee to bring about such compensable injury or death.

(b) The primary obligation to pay compensation is upon the employer, and the procurement of a policy of insurance by an employer to cover the obligation in respect to this chapter shall not relieve the employer of the obligation.

History. Init. Meas. 1948, No. 4, § 5, Acts 1949, p. 1420; Acts 1975 (Extended Sess., 1976), No. 1227, § 3; A.S.A. 1947, § 81-1305; reen. Acts 1987, No. 1015, § 3; Acts 1993, No. 796, § 9.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act,

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

ALR. Right to workers' compensation for physical injury or illness suffered by claimant as result of nonsudden mental stimuli — Right to compensation under particular statutory provisions. 122 A.L.R.5th 337.

Right to Workers' Compensation for Injury Suffered by Employee While Driving Employer's Vehicle. 28 A.L.R.6th 1.

Right to Workers' Compensation for Physical Injury or Illness Suffered by Claimant as Result of Nonsudden Mental Stimuli — Compensability under Particular Circumstances. 39 A.L.R.6th 445.

Right to Compensation under State Workers' Compensation Statute for Injuries Sustained During or as Result of Horseplay, Joking, Fooling, or the Like. 41 A.L.R.6th 207.

Injury to Employee as Arising out of or in Course of Employment for Purposes of State Workers' Compensation Statute — Effect of Employer-Provided Living Quar-

ters, Room and Board, or the Like. 42 A.L.R.6th 61.

Ark. L. Rev. Workmen's Compensation — Employee Returning to Work After Weekend — Whether "in Course of Employment," 7 Ark. L. Rev. 423.

The Relationship of Effort or Stress to Coronary Heart Disease, 17 Ark L. Rev. 39.

Workmen's Compensation — Injury from Act of God as One Arising Out of Employment, 18 Ark. L. Rev. 357.

Workmen's Compensation — Injury Arising Out of the Course of Employment — Horseplay, 19 Ark. L. Rev. 197.

Workmen's Compensation: The "Going and Coming Rule" and Its Exceptions in Arkansas, 20 Ark. L. Rev. 414.

Workmen's Compensation — Recreational Activities Within the Scope of Employment, 23 Ark. L. Rev. 682.

Workmen's Compensation: Injuries Sustained While Preparing for Work Ruled Compensable, 30 Ark. L. Rev. 89.

Leflar, Compensation for Work-Related Illness in Arkansas, 41 Ark. L. Rev. 89.

CASE NOTES

ANALYSIS

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Construction.

In considering a claim, the Workers' Compensation Commission must follow a liberal approach and draw all reasonable inferences favorable to the claimant; to further the beneficent and humane purposes of the Workers' Compensation law, all doubtful cases should be resolved in favor of the claimant. *American Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985).

Applicability.

The Arkansas Workers' Compensation Act does not specify what extrastate situations it covers. An employer's liability, however, is based upon disability or death from an injury arising out of and in the course of employment, and "employment" is defined as every employment carried on in the state. Therefore, the application of the Arkansas Workers' Compensation Act is limited by its terms to harms arising

out of employments carried on in Arkansas. *Patton v. Brown & Root, Inc.*, 31 Ark. App. 141, 789 S.W.2d 745 (1990).

Living assistance services provided by mother to disabled son were held not to be compensable nursing services. *Little Rock Convention & Visitors Bureau v. Pack*, 60 Ark. App. 82, 959 S.W.2d 415 (1997).

Appeal.

On appeal, the court will review the evidence in the light most favorable to the findings of the Workers' Compensation Commission and will give the testimony its strongest probative value in favor of the order of the commission. *Southwest Pipe & Supply v. Hoover*, 13 Ark. App. 144, 680 S.W.2d 723 (1984).

Assaults.

In the case of assaults, the general rule is that injuries resulting from an assault are compensable where the assault is causally related to the employment, but such injuries are not compensable when the assault arises out of purely personal reasons. *Pigg v. Auto Shack*, 27 Ark. App. 42, 766 S.W.2d 36 (1989).

Where altercation occurred during business hours, on the employer's premises, and as the result of a quarrel having its origin in the employment, the injuries were compensable. *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992).

An assault arises out of the employment either if the risk of assault is increased by the nature or setting of the work (regardless of the reason for the assault), or if the reason for the assault was a quarrel having its origin in the work; the test is an alternative one and the satisfaction of either condition will render injuries received as the result of an assault compensable. *Bryan v. Best Western/Coachman's Inn*, 47 Ark. App. 75, 885 S.W.2d 28 (1994).

Claimant, a maintenance worker and security guard, was injured in the course of his employment when he was assaulted by a trespasser who refused to leave the property; because the risk of assault was increased by the nature of the claimant's

work, the injury arose out of his employment. *Bryan v. Best Western/Coachman's Inn*, 47 Ark. App. 75, 885 S.W.2d 28 (1994).

Compensation.

The term "compensation" as used in this section refers to three kinds of benefits: (1) the money allowance payable for disability; (2) the medical and hospital services and supplies; and (3) funeral expenses. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Concurrent Benefit Rule.

The "concurrent benefit" rule calls for a liberal construction of the requirements of the statute that requires that the injury resulting in death must arise "out of and in the course of employment." *Robbins v. Jackson*, 232 Ark. 658, 339 S.W.2d 417 (1960).

The "concurrent benefit" rule had no application where deceased's death did not occur while he was performing the duties of his employment. *Robbins v. Jackson*, 232 Ark. 658, 339 S.W.2d 417 (1960).

The "concurrent benefit" rule cannot be applied to circumvent the necessity of a claimant first showing that his injury arose out of and in the course of employment. *Robbins v. Jackson*, 232 Ark. 658, 339 S.W.2d 417 (1960).

False Representation.

The trial court did not err in granting a workers' compensation award to an employee, even though he falsely represented on his employment application that he had no previous injury, where the employer told the employee to omit any reference to the injury because it would make his insurance go up. *Roberts-McNutt, Inc. v. Williams*, 288 Ark. 587, 708 S.W.2d 87 (Ark. 1986).

The following factors must be present before a false statement in an employment application will bar benefits: (1) the employee must have knowingly and willfully made a false representation as to his physical condition, (2) the employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring, and (3) there must have been a causal connection between the false representation and the injury. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988); *James*

River Corp. v. Walters, 53 Ark. App. 59, 918 S.W.2d 211 (1996).

The commission's finding that employer failed to prove that it relied on false representations made by the employee when it decided to hire him was supported by substantial evidence in that the employment application appeared to have been filled out by someone other than the employee some four months after he was hired. *James River Corp. v. Walters*, 53 Ark. App. 59, 918 S.W.2d 211 (1996).

Healing Period.

Recurring symptoms may give rise to a subsequent healing period, after the original one has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

Determination that employee's healing period had not ended was supported by substantial evidence. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

Idiopathic Fall.

The effects of an idiopathic fall may be compensable if the employment places the employee in a position increasing the dangerous effects of such a fall. *Nu-Way Laundry & Cleaners v. Palmer*, 12 Ark. App. 31, 670 S.W.2d 464 (1984).

When a truly unexplained fall occurs while the employee is on the job and performing the duties of his employment, the injury resulting therefrom is compensable. *Moore v. Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496 (1987).

Injury Arising out of and in Course of Employment.

Before a widow can recover, it must appear that her husband's death arose out of his employment and also in the course of his employment. *Robbins v. Jackson*, 232 Ark. 658, 339 S.W.2d 417 (1960).

Injury held not to arise out of and in course of employment. *Moseley v. Temple*, 231 Ark. 502, 330 S.W.2d 719 (1960); *Robbins v. Jackson*, 232 Ark. 658, 339 S.W.2d 417 (1960); *Williams v. Central Flying Serv., Inc.*, 236 Ark. 709, 368 S.W.2d 87 (1963); *Willis v. Dumas*, 250 Ark. 496, 466 S.W.2d 268 (1971); *Foster v. Johnson*, 264 Ark. 894, 576 S.W.2d 187 (1979).

Independent contractors were not constituted employees by a clause in the contract which provided the alleged employer should carry Workers' Compensation

tion insurance on them and deduct their pro rata share of the premiums from their remuneration. *Hughes v. Hooker Bros.*, 237 Ark. 544, 374 S.W.2d 355 (1964).

Injuries suffered by employees, who at the precise moment of the accident are not acting within the course and scope of their employment may be compensated if their temporary departure from the job is not great. *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978).

Injury held to have occurred in the course of employment. *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978); *Benton Serv. Ctr. v. Pinegar*, 269 Ark. 768, 601 S.W.2d 227 (1980); *Moore v. Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496 (1987); *Preway, Inc. v. Davis*, 22 Ark. App. 132, 736 S.W.2d 21 (1987).

The Workers' Compensation Commission should follow a liberal approach in determining whether the accident in fact grew out of and occurred in the course of the employment and it is the duty of the commission to draw all legitimate inferences possible in favor of the claimant and to give the claimant the benefit of doubt. *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

An employer's obligation under workers' compensation may extend beyond termination when the activity causing injury is a normal and reasonable incident of the employment relationship. *Jones v. City of Imboden*, 39 Ark. App. 19, 832 S.W.2d 866 (1992).

An injury may be found to have occurred "in the course of employment" despite the fact that the claimant had been discharged prior to the work-related assault. *Jones v. City of Imboden*, 39 Ark. App. 19, 832 S.W.2d 866 (1992).

The phrase "arising out of the employment" refers to the origin or cause of the accident. The phrase "in the course of" the employment refers to the time, place and circumstances under which the injury occurs. *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992), *aff'd*, 313 Ark. 100, 852 S.W.2d 804 (1993).

—Causal Connection.

An accident arises "out of" the employment when there is a causal connection between the two; that is, when the accident results from a risk reasonably incident to the employment. *Southland Corp.*

v. Hester, 253 Ark. 959, 490 S.W.2d 132 (1973).

Where second injury results from non-work-related negligent conduct on the part of the claimant which effects an independent intervening cause, no liability can be placed upon the employer; where it occurs within the scope of the employment, the neglect of the claimant leading to his injury is of no consequence. The employer at the time of the injury is liable for all consequences of that injury without regard to the claimant's conduct. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

The mere fact that an assault occurs on an employer's parking lot or in close proximity to his place of employment does not establish a causal connection with the employment. *Bagwell v. Falcon Jet Corp.*, 8 Ark. App. 192, 649 S.W.2d 841 (1983).

In order for a worker's disability to be compensable, there must be a causal connection between the accident and a risk which is reasonably incident to the employment. There must be affirmative proof of a distinctive employment risk as the cause of the injury; the connection with the employment cannot be supplied by speculation. *Bagwell v. Falcon Jet Corp.*, 8 Ark. App. 192, 649 S.W.2d 841 (1983); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

It is not essential that the causal relationship between the accident and disability be established by medical evidence. *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

Causal connection held established. *Benton Serv. Ctr. v. Pinegar*, 269 Ark. 768, 601 S.W.2d 227 (1980); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

Causal connection held not established. *Southland Corp. v. Hester*, 253 Ark. 959, 490 S.W.2d 132 (1973); *Hammer v. Intermed N.W.*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Henson v. Club Prods.*, 22 Ark. App. 136, 736 S.W.2d 290 (1987); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987); *Woodard v. White Spot Cafe*, 30 Ark. App. 221, 785 S.W.2d 54 (1990).

Where it was clear that if it had not been for the stress placed on the employee at his workplace, there would have been no suicide, then there was no independent intervening cause breaking the chain of causation between the stress employee

experienced as a result of his employment and his suicide, and the exclusion provided in subdivision (b)(2) did not apply. *George W. Jackson Mental Health Ctr. v. Lambie*, 49 Ark. App. 139, 898 S.W.2d 479 (1995).

Where there was no causal connection between injury and employment other than employee's own assertion that a fall occurred; commission's finding that employee was not credible was a permissible one and the Commission's opinion displayed a substantial basis for the denial of relief. *Kuhn v. Majestic Hotel*, 50 Ark. App. 23, 899 S.W.2d 845 (1995), rev'd, 324 Ark. 21, 918 S.W.2d 158 (1996).

Employee held to have experienced an "unexplained fall," a compensable injury. *Little Rock Convention & Visitors Bureau v. Pack*, 60 Ark. App. 82, 959 S.W.2d 415 (1997).

—Evidence.

Workers' compensation claimant bears the burden of proving that his injury was the result of an accident that arose in the course of his employment, and that it grew out of, or resulted from, the employment. *Moore v. Darling Store Fixtures*, 22 Ark. App. 21, 732 S.W.2d 496 (1987).

Evidence sufficient to support finding that employee's psychological disorders were not causally connected to his compensable burn injury. *Henson v. Club Prods.*, 22 Ark. App. 136, 736 S.W.2d 290 (1987).

Evidence sufficient to find causal connection between original injury and subsequent complication which resulted in a second healing period. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

Evidence sufficient to support finding of an independent intervening cause. *Appleby v. Belden Corp.*, 22 Ark. App. 243, 738 S.W.2d 807 (1987).

Because employee injured by a tornado while eating dinner was a resident employee, on call 24 hours a day, seven days a week, and one could reasonably expect this type of employee to, at some point, sit down to eat dinner, the commission's decision that the employee was injured while "in the course of" his employment was supported by substantial evidence. *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992), aff'd, 313 Ark. 100, 852 S.W.2d 804 (1993).

Employee failed to prove that he sustained compensable injuries to his feet and to his back. *Morelock v. Kearney Co.*, 48 Ark. App. 227, 894 S.W.2d 603 (1995).

—Going to or from Work.

Injuries incurred while traveling to or from work held not to arise out of employment. *Dickinson v. Central Constr. Co.*, 233 Ark. 360, 344 S.W.2d 599 (1961); *American Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985).

The general rule is that injuries which occurred while an employee is going to or from work are not compensable since all persons, including employees, are subject to the recognized hazards of travel to and from work in a vehicle, generally referred to as the "street risk doctrine." *Williams v. National Youth Corps in Sch. Programs*, 269 Ark. 649, 600 S.W.2d 27 (Ct. App. 1980).

Injuries sustained while traveling to or from work held compensable. *Williams v. National Youth Corps in Sch. Programs*, 269 Ark. 649, 600 S.W.2d 27 (Ct. App. 1980).

Injuries sustained by employees while going to and returning from their regular place of employment are not, as a general rule, deemed to arise out of and in the course of employment. *American Red Cross v. Hogan*, 13 Ark. App. 194, 681 S.W.2d 417 (1985); *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995).

Although an exception to the going and coming rule may operate to place an employee traveling to or from work within the course of his employment, it does not follow that the employee's injury is therefore compensable, because the employee must still show that the injury arose out of his employment. *Woodard v. White Spot Cafe*, 30 Ark. App. 221, 785 S.W.2d 54 (1990).

The exception to the going and coming rule permitting recovery for injuries received by employees traveling between two parts of an employer's premises, such as by way of a public street, was applicable to injury incurred prior to July 1, 1993 (the effective date of the amendment of § 11-9-102(5)(B)(iii) (now § 11-9-102(4))), where employee was struck by a car after parking in employer's parking lot. *Wentworth v. Sparks Regional Medical Ctr.*, 49 Ark. App. 10, 894 S.W.2d 956 (1995).

Some nexus between the employment and travel must be present in order for a claimant to recover for injuries sustained on a trip from his employer's premises to his home. *Lepard v. West Memphis Mach. & Welding*, 51 Ark. App. 53, 908 S.W.2d 666 (1995).

—Positional Risk.

Under the positional risk doctrine, an injury arises out of the employment if it would not have occurred but for the fact that the conditions and obligations of the employment placed claimant in the position where he was injured. The only connection of the employment with the injury is that its obligations placed the employee in a particular place at the particular time when he is injured by some neutral force, "neutral" meaning neither personal to the claimant nor distinctly associated with the employment. *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992), *aff'd*, 313 Ark. 100, 852 S.W.2d 804 (1993).

A worker required to be on company property 24 hours a day, who was injured by a tornado while on company property eating dinner, was entitled to compensation for that injury, as the tornado constituted a neutral risk. *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992), *aff'd*, 313 Ark. 100, 852 S.W.2d 804 (1993).

—Preexisting Condition.

Preexisting disease or infirmity of an employee does not disqualify a claim under the "arising out of employment" requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Black v. Riverside Furn. Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982) Criticized by *Cox v. Nashville Livestock Com.*, 28 Ark. App. 138, 771 S.W.2d 786 (1989).

The aggravation of the symptoms of a preexisting heart condition was not compensable. *Black v. Riverside Furn. Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982) Criticized by *Cox v. Nashville Livestock Com.*, 28 Ark. App. 138, 771 S.W.2d 786 (1989).

An award of workers' compensation benefits will be sustained where heart attack is shown to have been aggravated or precipitated by the employment; there is no requirement that in order for a heart

attack to be compensable, it must be caused or brought on by some unusual exertion rather than by the employee's regular work. *C.J. Horner Co. v. Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985), *aff'd*, 286 Ark. 342, 691 S.W.2d 861 (Ark. 1985).

Where the requirement of a causal connection is not met, the commission did not err in finding employee's psychological disorders not compensable as an aggravation of a preexisting condition. *Henson v. Club Prods.*, 22 Ark. App. 136, 736 S.W.2d 290 (1987).

Where injuries sustained while working for employer amounted to an aggravation, not a recurrence, of previous injury, employer was liable for the aggravation of the old injury. *Hawkins Constr. v. Maxell*, 52 Ark. App. 116, 915 S.W.2d 302 (1996), *rev'd*, 325 Ark. 133, 924 S.W.2d 789 (1996).

—Specific Diseases or Conditions.

An attack of angina pectoris which results in disability may constitute an injury giving rise to compensation if it arises out of and occurs in the course of employment; and a work-related disabling angina attack, although temporary, is a disability. *Nashville Livestock Comm'n v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990).

Substantial evidence supported the determination that the claimant's carpal tunnel syndrome was not causally related to her employment where: (1) the claimant's supervisors testified that she worked no more than 30 minutes at a time on a production line; (2) the claimant first noticed a problem with her hands while she was a supervisor; (3) the claimant often played volleyball, racquetball, and walleyball; and (4) the claimant told a company nurse that she might have to stop playing volleyball and racquetball because her hands hurt, but she never told anyone that her injury was work-related. *Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998).

—Stress.

Evidence that employee took his own life because of job-related stress held sufficient, particularly where there was nothing in the record indicating any other possible reason for his suicide. *George W. Jackson Mental Health Ctr. v. Lambie*, 49 Ark. App. 139, 898 S.W.2d 479 (1995).

—Travel.

In situations where employee's work requires travel on his employer's business, Arkansas has adopted the traveling salesman doctrine. *Arkansas Dep't of Health v. Huntley*, 12 Ark. App. 287, 675 S.W.2d 845 (1984).

Injuries incurred by employee while traveling on employer's business held to be a natural and probable consequence or incident of her employment and to arise out of and in the course of employment. *Arkansas Dep't of Health v. Huntley*, 12 Ark. App. 287, 675 S.W.2d 845 (1984).

Inspections.

An insurer, under this section, assumes only the employer's liability to pay compensation and is not required to make safety inspections. *Horne v. Security Mut. Cas. Co.*, 265 F. Supp. 379 (E.D. Ark. 1967).

This chapter does not permit an employee's common-law action against a workers' compensation carrier for negligent safety inspections of the employer's premises, as such an action would be contrary to the purposes and policies underlying the chapter. *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir. 1985).

Insurance Coverage.

There is no statute which prohibits an employer and its insurer from excluding health care insurance benefits for injuries or illnesses covered by workers' compensation since, without such a clause, insureds might be allowed double recovery for certain medical or income disability expenses already paid for by workers' compensation; there is no reason why an insurance clause that precludes the prospects of double recovery of medical benefits would be against public policy. *Atkins v. Pilot Life Ins. Co.*, 4 Ark. App. 257, 630 S.W.2d 50 (1982).

The employer is required by the state to carry insurance, and the state dictates the rates to be charged. *Wal-Mart Stores, Inc. v. Crist*, 664 F. Supp. 1242 (W.D. Ark. 1987), rev'd, 855 F.2d 1326 (8th Cir. Ark. 1988).

Obligations of an employee who negligently injured her employer could not arise under this chapter. *Estate of Sodorff v. United S. Assurance Co.*, 980 F. Supp. 1004 (W.D. Ark. 1997).

Intent to Injure.

Where employer willfully assaulted employee, the fact that employee might have recovered under this chapter did not bar employee's action for damages. *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950).

The willful misconduct or willful intent to injure an employee in a work connected fight which will bar his recovery of workers' compensation for resulting injuries must be premeditated or deliberate and violent. *Johnson v. Safreed*, 224 Ark. 397, 273 S.W.2d 545 (1954).

Claimant held entitled to benefits for injuries suffered in work-related fight where no willful intent to injure was established. *Johnson v. Safreed*, 224 Ark. 397, 273 S.W.2d 545 (1954); *Safeway Stores, Inc. v. McDowell*, 2 Ark. App. 321, 621 S.W.2d 15 (1981); *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992).

For claimant's injury to be found non-compensable under subdivision (a)(2), claimant must have had a willful intention to injure himself or another or a willful intention to injure denoting premeditated or deliberate misconduct, rather than a sudden or impulsive act, and have acted with a physical force designed to inflict real injury. *Ramirez v. Hudson Foods, Inc.*, 53 Ark. App. 49, 918 S.W.2d 207 (1996).

Intoxication.

Burden is on the employer to show that employee's death resulted solely from his intoxicated condition. *Elm Springs Canning Co. v. Sullins*, 207 Ark. 257, 180 S.W.2d 113 (1944) (decision under prior law); *Cox Bros. Lumber Co. v. Jones*, 220 Ark. 431, 248 S.W.2d 91 (1952) (decision prior to 1976 amendment).

Evidence insufficient to show employee's intoxication caused injury. *Cox Bros. Lumber Co. v. Jones*, 220 Ark. 431, 248 S.W.2d 91 (1952); *Jones Truck Lines v. Letsch*, 245 Ark. 982, 436 S.W.2d 282 (1969).

Reference to injuries caused solely by intoxication was not intended to include the effects of medication innocently taken upon the orders of a physician. *Jones Truck Lines v. Letsch*, 245 Ark. 982, 436 S.W.2d 282 (1969) (decision prior to 1976 amendment).

Evidence supported conclusion that employee's death was "solely occasioned by

intoxication." *Goza v. Central Ark. Dev. Council, Inc.*, 254 Ark. 694, 496 S.W.2d 388 (1973) (decision prior to 1976 amendment).

Evidence supported finding that the claimant's injury was substantially occasioned by his intoxication. *Country Pride v. Holly*, 3 Ark. App. 216, 624 S.W.2d 443 (1981); *Davis v. C & M Tractor Co.*, 4 Ark. App. 34, 627 S.W.2d 561 (1982); *Southwest Pipe & Supply v. Hoover*, 13 Ark. App. 144, 680 S.W.2d 723 (1984).

Employer's knowledge of the claimant's propensity to consume alcohol did not estop the employer from raising the defense of intoxication. *Davis v. C & M Tractor Co.*, 4 Ark. App. 34, 627 S.W.2d 561 (1982).

Blood test which indicated that the claimant was intoxicated at the time of his accident held admissible. *Davis v. C & M Tractor Co.*, 4 Ark. App. 34, 627 S.W.2d 561 (1982).

Commission's finding that employer was not estopped to assert the defense of intoxication was supported by substantial evidence. *Blevins v. Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988).

Multiple Employment.

Where joint employment occurs both employers are liable for workers' compensation. *Williams v. National Youth Corps in Sch. Programs*, 269 Ark. 649, 600 S.W.2d 27 (Ct. App. 1980).

Where there is a dual employment and the particular industry in which the injury occurs can be clearly identified, the employer in whose service the employee was acting at the time of his injury should be exclusively liable for the consequences of that injury. *Great Cent. Ins. Co. v. Mel's Texaco*, 8 Ark. App. 236, 651 S.W.2d 101 (1983).

Out-of-State Injury.

An Arkansas resident came under Arkansas Workers' Compensation Law, even though his injury occurred in another state in which all of his employment was performed. *International Paper Co. v. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971).

Where claimant was injured while working in another state and the only

circumstance bearing on jurisdiction was that claimant was an Arkansas resident, and facts connecting the state with the employment per se were entirely lacking, the statutory basis required for the commission's jurisdiction was absent. *Patton v. Brown & Root, Inc.*, 31 Ark. App. 141, 789 S.W.2d 745 (1990).

—Reasonableness of Activity.

In determining whether the claimant's horseback riding was unreasonable under the circumstances, and thus, precluded recovery, Commission should have considered the claimant's knowledge of his condition where the claimant, after horseback riding, suffered a second injury from fainting caused by pain from his work-related injury. *Lunsford v. Rich Mt. Elec. Co-op*, 33 Ark. App. 66, 800 S.W.2d 732 (1990).

In determining whether recovery for second injury caused by pain from work related injury was precluded by claimant's horseback riding, claimant's belief that the activity had been cleared by his doctor should be considered in determining whether claimant's horseback riding was unreasonable "under the circumstances". *Lunsford v. Rich Mt. Elec. Co-op*, 33 Ark. App. 66, 800 S.W.2d 732 (1990).

Third-Party Claim.

In matters involving workers' compensation benefits the employer shall be immune from third-party tortfeasors claim. *W.M. Bashlin Co. v. Smith*, 277 Ark. 406, 643 S.W.2d 526 (1982), superseded by statute as stated in, *Billings v. Aeropres Corp.*, 522 F. Supp. 2d 1121 (E.D. Ark. 2007).

Cited: *Ellington v. Hartford Steam Boiler Inspection & Ins. Co.*, 53 F.R.D. 280 (W.D. Ark. 1971); *Green v. Jacuzzi Bros.*, 269 Ark. 733, 600 S.W.2d 448 (Ct. App. 1980); *Kempner's & Dodson Ins. Co. v. Hall*, 7 Ark. App. 181, 646 S.W.2d 31 (1983); *New Hampshire Ins. Co. v. Logan*, 13 Ark. App. 116, 680 S.W.2d 720 (1984); *Pittman v. Wygal Trucking Plant*, 16 Ark. App. 232, 700 S.W.2d 59 (1985); *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir. 1985); *Sloat Chiropractic Clinic v. Datsun*, 17 Ark. App. 161, 706 S.W.2d 181 (1986).

**11-9-402. Liability of prime contractors and subcontractors —
Sole proprietorships or partnerships.**

(a) Where a subcontractor fails to secure compensation required by this chapter, the prime contractor shall be liable for compensation to the employees of the subcontractor unless there is an intermediate subcontractor who has workers' compensation coverage.

(b)(1) Any contractor or the contractor's insurance carrier who shall become liable for the payment of compensation on account of injury to or death of an employee of his or her subcontractor may recover from the subcontractor the amount of the compensation paid or for which liability is incurred.

(2) The claim for the recovery shall constitute a lien against any moneys due or to become due to the subcontractor from the prime contractor.

(3) A claim for recovery, however, shall not affect the right of the injured employee or the dependents of the deceased employee to recover compensation due from the prime contractor or his or her insurance carrier.

(c)(1)(A) When a sole proprietorship or partnership fails to elect to cover the sole proprietor or partners under this chapter, the prime contractor is not liable under this chapter for injuries sustained by the sole proprietor or partners if the sole proprietor or partners are not employees of the prime contractor.

(B)(i) A sole proprietor or the partners of a partnership who do not elect to be covered by this chapter and be deemed employees thereunder and who deliver to the prime contractor a current certification of noncoverage issued by the Workers' Compensation Commission shall be conclusively presumed not to be covered by the law or to be employees of the prime contractor during the term of his or her certification or any renewals thereof.

(ii) A certificate of noncoverage may not be presented to a subcontractor who does not have workers' compensation coverage.

(iii) This provision shall not affect the rights or coverage of any employees of the sole proprietor or of the partnership.

(2) Furthermore, the prime contractor's insurance carrier is not liable for injuries to the sole proprietor or partners described in this section who have provided a current certification of noncoverage, and the carrier shall not include compensation paid by the prime contractor to the sole proprietor or partners described above in computing the insurance premium for the prime contractor.

(3)(A) Any prime contractor who after being presented with a current certification of noncoverage by a sole proprietor or partnership nonetheless compels the sole proprietor or partnership to pay or contribute to workers' compensation coverage of that sole proprietor or partnership shall be guilty of a Class D felony.

(B) Furthermore, any prime contractor who compels a sole proprietor or partnership to obtain a certification of noncoverage when the

sole proprietor or partnership does not desire to do so is guilty of a Class D felony.

(C) Furthermore, any applicant who makes a false statement when applying for a certification of noncoverage or any renewals thereof shall be guilty of a Class D felony.

(d)(1) A certification of noncoverage issued by the commission after July 1, 2001, shall be valid for two (2) years after the effective date stated thereon. Both the effective date and the expiration date must be listed on the face of the certificate by the commission. The certificate must expire at midnight two (2) years from its issue date, as noted on the face of the certificate.

(2) Any certification of noncoverage that is in effect on July 1, 2001, shall expire as follows:

(A) A certification of noncoverage issued in the years 1993 or 1994 shall expire at midnight on September 30, 2001;

(B) A certification of noncoverage issued in the years 1995 or 1996 shall expire at midnight on December 31, 2001;

(C) A certification of noncoverage issued in the years 1997 or 1998 shall expire at midnight on March 31, 2002; and

(D) A certification of noncoverage issued in the years 1999 or 2000 shall expire at midnight on June 30, 2002.

(3) The commission may assess a fee not to exceed fifty dollars (\$50.00) with each application for a certification of noncoverage or any renewals thereof.

(4) Any certification of noncoverage issued by the commission shall contain the social security number and notarized signature of the applicant. The notarization shall be in a form and manner prescribed by the commission.

(5) The commission may prescribe by rule forms and procedures for issuing or renewing a certification of noncoverage.

History. Init. Meas. 1948, No. 4, § 6, Acts 1949, p. 1420; A.S.A. 1947, § 81-1306; Acts 1987, No. 941, § 1; 1993, No. 796, § 10; 2001, No. 1757, § 6; 2005, No. 1917, § 1.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by

this act, which originated as House Bill 2646 of 2001."

Acts 2001, No. 1757, § 12, provided: "All laws and parts of laws expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999."

Publisher's Notes. Acts 1987, No. 941, § 2, provided that the act did not repeal or supersede Init. Meas. 1948, No. 4, § 6.

CASE NOTES

ANALYSIS

Constitutionality.
Purpose.
Applicability.
Contractor's Liability.

Contractor-Subcontractor Relationship.
Employment Relationship.
Estoppel.
Foreign Law.
Insurance Coverage.
Recovery from Subcontractor.

Sole Proprietor Exemption.

Constitutionality.

Provision making prime contractor liable for compensation to employees of subcontractor who has failed to secure compensation coverage as required by law is valid. *Corban v. Skelly Oil Co.*, 256 F.2d 775 (5th Cir. 1958).

Purpose.

The primary purpose is to protect the employees of subcontractors who are not financially responsible, and to prevent employers from relieving themselves from liability by doing through independent contractors what they would otherwise do through direct employees. *Liggett Constr. Co. v. Griffin*, 4 Ark. App. 247, 629 S.W.2d 316 (1982).

This section is not for the benefit of the subcontractor, but rather for the unprotected subcontractor's employees. The same person can not be both the subcontractor and the injured employee, because to so hold ignores both the purpose of this section and its various provisions. *Employers Ins. of Wausau v. Polar Express, Inc.*, 780 F. Supp. 610 (W.D. Ark. 1991).

Applicability.

Although an injured worker alleged that a healthcare company was a prime contractor for purposes of subsection (a) of this section, such a finding by the court would have afforded him no relief since he had elected to sue in tort under § 11-9-105(b), and subsection (a), which made a prime contractor liable for compensation to employees of subcontractors who failed to secure compensation, was a workers' compensation statute that governed claims filed with the Arkansas Workers' Compensation Commission. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

Contractor's Liability.

Commission erred in disregarding the corporate entity of the subcontractor in determining whether a prime contractor should be liable for compensation to an injured employee of the subcontractor. *Thomas v. Southside Contractors*, 260 Ark. 694, 543 S.W.2d 917 (1976).

Evidence sufficient to find general contractor was liable for benefits to employee of subcontractor. *Liggett Constr. Co. v. Griffin*, 4 Ark. App. 247, 629 S.W.2d 316 (1982).

Subcontractor's employee held to have been injured in the performance of work for the general contractor. *D & M Constr. Co. v. Archer*, 14 Ark. App. 198, 686 S.W.2d 799 (1985).

When the subcontractor carries no compensation insurance, the prime contractor is made a statutory employer and has the same immunity as a regular employer. *Lewis v. Industrial Heating & Plumbing*, 290 Ark. 291, 718 S.W.2d 941 (1986).

The liability arising on the part of a prime contractor would not extend to subcontractors under this section, but would be limited to the subcontractor's employees. *Estate of Sodorff v. United S. Assurance Co.*, 980 F. Supp. 1004 (W.D. Ark. 1997).

Where claimant was an employee of his brother, an uninsured subcontractor of the roofing company, the roofing company was the prime contractor liable for workers' compensation benefits to claimant; the fact that claimant's brother may have been an independent contractor for the roofing company did not preclude him from also being a subcontractor of the roofing company for purposes of this section. *Garcia v. A&M Roofing*, 89 Ark. App. 251, 202 S.W.3d 532 (2005).

Where injured worker was employed by an uninsured subcontractor, appellant contractor, as the "prime contractor", was ordered to pay workers' compensation benefits to the worker; substantial evidence supported the Arkansas Workers' Compensation Commission's finding that the necessary links existed between the work the injured worker was performing and the contract with the Arkansas State Highway Commission in that all subcontractors were performing services that arose from this contract and the contractor was the only one with an obligation to a third party. *Jones Bros. v. Journagan Constr. Co.*, 92 Ark. App. 406, 214 S.W.3d 870 (2005), modified, *Jones Bros., Inc. v. Whitlock*, 366 Ark. 254, 234 S.W.3d 864 (2006).

Stipulations and testimony, particularly the fact that general contractor had subcontracted the roofing on a house to a roofing subcontractor, along with the court's interpretation of the terms "prime contractor" and "general contractor," constituted substantial evidence that the general contractor was the prime contractor and, thus, was statutorily liable for the

subcontractor's employee's injuries. *Musson Custom Bldg., Inc. v. Valladares*, 93 Ark. App. 490, 222 S.W.3d 214 (2006).

Where contractor hired a third party, who in turn hired a subcontractor to perform work on a highway project where employee was injured, the contractor was liable to subcontractor's injured employee because of subcontractor's failure to pay insurance. *Jones Bros., Inc. v. Whitlock*, 366 Ark. 254, 234 S.W.3d 864 (2006).

Contractor-Subcontractor Relationship.

Contractor-subcontractor relationship not established. *Andrews v. Gross & Janes Tie Co.*, 211 Ark. 999, 204 S.W.2d 783 (1947) (decision under prior law); *Lofton v. Bryan*, 237 Ark. 376, 373 S.W.2d 145 (1963); *Eagle Star Ins. Co. v. Deal*, 337 F. Supp. 1264 (W.D. Ark. 1972), rev'd, 474 F.2d 1216 (8th Cir. 1973).

Contractor-subcontractor relationship established. *Brothers v. Dierks Lumber & Coal Co.*, 217 Ark. 632, 232 S.W.2d 646 (1950) (decision under prior law); *Huffstettler v. Lion Oil Co.*, 110 F. Supp. 222 (W.D. Ark. 1953), aff'd, 208 F.2d 549 (8th Cir. Ark. 1953); *Brower Mfg. Co. v. Willis*, 252 Ark. 755, 480 S.W.2d 950 (1972) (decision under prior law) *D & M Constr. Co. v. Archer*, 14 Ark. App. 198, 686 S.W.2d 799 (1985).

Before an independent contractor can be found a "subcontractor" within the meaning of this section, it must first be established that the one sought to be held liable as "prime contractor" was contractually obligated to a third person for the work being performed by the independent contractor. *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982).

Where the evidence showed that owners of property upon which a house was being built were not contractually bound to any third person in connection with the work being done by the independent contractor and his injured employee, and that the owners exercised no control over either of them, the owners of the property could not be held liable as the prime contractors. *Bailey v. Simmons*, 6 Ark. App. 193, 639 S.W.2d 526 (1982).

The duties of a general contractor to a subcontractor's employees are analogous to those of an owner of the premises, and include the duty to exercise ordinary care, the duty to warn of unusually hazardous

conditions that might affect the welfare of the subcontractor's employees, and if the general contractor begins to perform certain duties or activities and then negligently fails to perform or performs in a negligent manner, he may also be held liable. *Franklin v. Osca, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992).

A general contractor's liability can be likened to the "business invitee" concept: when a general contractor invites a subcontractor onto a job site, the general contractor has a duty to exercise ordinary care for the welfare of the subcontractor's employees. *Franklin v. Osca, Inc.*, 308 Ark. 409, 825 S.W.2d 812 (1992).

Where the citizens of the northeast portion of county assessed a tax against themselves in order to secure dependable emergency ambulance service, and the county only served as a conduit to collect the tax and turn it over to the service on an as-needed basis, the subcontractor-prime contractor provision of subsection (a) was not applicable. *Sloan v. Voluntary Ambulance Serv.*, 37 Ark. App. 138, 826 S.W.2d 296 (1992).

Contractor was liable for workers' compensation benefits to claimant, as an employee of an uninsured subcontractor, where the contractor subcontracted out a roofing job, and that subcontractor contracted out the job to another roofer, who employed the claimant. *Garcia v. A&M Roofing*, 89 Ark. App. 251, 202 S.W.3d 532 (2005).

Arkansas Workers' Compensation Commission erred in holding that an employer, a registered carrier, was a transportation broker's uninsured subcontractor and that the broker was an injured employee's statutory employer under § 11-9-402(a) where the broker was not obligated to transport any loads for a shipper; hence, it had no work to "farm out" to the employer. *Transplace Stuttgart, Inc. v. Carter*, 98 Ark. App. 418, 255 S.W.3d 878 (2007).

Employment Relationship.

The legislature has created the relationship of employer and employee between the employee of a subcontractor who has not secured compensation and the prime contractor; however, this statutory relationship does not exist when the employee has received compensation from the subcontractor and he may proceed against the prime contractor on a common law action

of tort as against a third party. *Baldwin Co. v. Maner*, 224 Ark. 348, 273 S.W.2d 28 (1954), superseded by statute as stated in, *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (Ark. 1998).

Under Workers' Compensation Law of Arkansas, the prime contractor is not the employer of an employee of a subcontractor and becomes the statutory employer liable for compensation only when the subcontractor has failed to provide workers' compensation insurance. *Carter v. Fraser Constr. Co.*, 219 F. Supp. 650 (W.D. Ark. 1963).

Whether a claimant was an employee of a subcontractor was a question of fact to be determined by the Workers' Compensation Commission, and that finding on appeal would be given the same effect as the verdict of a jury. *Benfield Real Estate v. Mitchell*, 269 Ark. 607, 599 S.W.2d 445 (Ct. App. 1980).

Evidence supported commission's finding that claimant was an employee of subcontractor and was entitled to benefits. *Benfield Real Estate v. Mitchell*, 269 Ark. 607, 599 S.W.2d 445 (Ct. App. 1980).

The determination of whether, at the time of injury, a person was an employee or an independent contractor is a factual one and the Workers' Compensation Commission is required to follow a liberal approach, resolving doubts in favor of employment status for the worker and a reviewing court will view the evidence in the light most favorable to the Commission's decision. *D & M Constr. Co. v. Archer*, 14 Ark. App. 198, 686 S.W.2d 799 (1985).

Arkansas Workers' Compensation Commission found that Arkansas Forestry Commission (AFC) was not obligated to a third-party for the business's proper completion of a state contract and, thus, the AFC was not a prime contractor; the Commission found that the business was a contractor to the AFC, but the AFC was a contractor to no one. *Riddell Flying Serv. v. Callahan*, 90 Ark. App. 388, 206 S.W.3d 284 (2005).

Fact that the truck driver had obtained a certificate of non-coverage under this section did not preclude the Arkansas Workers Compensation Commission from concluding that the driver was an employee of the company for purposes of determining entitlement to workers' com-

pensation benefits; the Commission based its conclusion of an employment relationship upon the incidents of control exerted by the company, including ownership and maintenance of the truck and the ability to order the employee to a pick-up location at any time. *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005).

Substantial evidence supported the Arkansas Workers' Compensation Commission's decision that a claimant's relationship with a contractor was that of an independent contractor because that was the relationship both parties agreed to before the work began and, as such, the contractor was not liable for the claimant's injuries, pursuant to subdivision (c)(1)(A) of this section; the claimant acknowledged his intent in the beginning of the work relationship with the contractor was that no taxes would be withheld from his pay and the claimant would not be covered by workers' compensation insurance. *Woodmancy v. Framco, Inc.*, 2011 Ark. App. 785, — S.W.3d — (2011).

Estoppel.

Corporation which agrees to furnish workers' compensation coverage to subcontractor and his employees is estopped to deny that subcontractor is entitled to benefits. *Stillman v. Jim Walter Corp.*, 236 Ark. 808, 368 S.W.2d 270 (1963).

In an action by carrier of workers' compensation insurance of a prime contractor against a subcontractor to recover amounts paid to an injured employee of the subcontractor, the carrier may be barred by estoppel where insurance premium has been paid or it was carrier's fault that it had not been paid. *Phoenix of Hartford v. Coney*, 249 Ark. 447, 459 S.W.2d 558 (1970).

Carrier was estopped from seeking to recover from subcontractor for benefits paid to the subcontractor's injured employee, even though it was not established that the carrier received and retained premiums withheld from subcontractor's payment. *Phoenix of Hartford v. Coney*, 249 Ark. 447, 459 S.W.2d 558 (1970).

Where the insured "employer's" liability is based upon estoppel, or other equitable considerations, the estoppel will not automatically apply to an insurance carrier whose liability is to be determined by this chapter. *Phoenix of Hartford v. Coney*, 249 Ark. 447, 459 S.W.2d 558 (1970).

Where there was no proof that claimant knew that the subcontractor's compensation insurance policy had been canceled at the time he discussed a subcontract for work with prime contractor, claimant was not estopped to assert liability on the part of prime contractor. *Thomas v. Southside Contractors*, 260 Ark. 694, 543 S.W.2d 917 (1976).

Foreign Law.

Employee who had received Workers' Compensation benefits from another state was not precluded against third party responsible for accident in Arkansas even though other state's workers' compensation statutes provided that the provisions were exclusive. *Carroll v. Lanza*, 349 U.S. 408, 75 S. Ct. 804 (1955).

Insurance Coverage.

Agreement executed after workers' compensation policy to the effect that policy would cover all employees, including employees of any contractor or subcontractor engaged by insured, who had not provided for compensation coverage of their operations, related back to the effective date of the policy and covered employees of contractor as effectively as if specifically mentioned therein. *Thomas Bros. Lumber Co. v. Hill*, 204 Ark. 976, 166 S.W.2d 3 (1942) (decision under prior law).

In the absence of certification of noncoverage, a subcontractor who is a sole proprietor or partner but does not insure himself is not necessarily statutorily deemed an employee and the prime contractor is not necessarily liable for his workers' compensation coverage; instead, it is necessary to determine whether such individual is a subcontractor, independent contractor, or, depending upon the right of control, an agent of the prime contractor that should be treated as an employee under the workers' compensation statutes. *Aloha Pools & Spas, Inc. v. Employer's Ins.*, 342 Ark. 398, 39 S.W.3d 440 (2000).

Recovery from Subcontractor.

The statutory right of the carrier to recover from the subcontractor is not dependent upon the right of the prime contractor, but rather depends only upon the payment of the claim by the carrier, whose claim for recovery does not affect its liability to the injured employee. *Phoenix of Hartford v. Coney*, 249 Ark. 447, 459 S.W.2d 558 (1970).

Subsection (a) of this section refers to the prime contractor's liability to employees of the uninsured subcontractor, and subdivision (b)(1) refers to recovery from the subcontractor; thus, it was error to order recovery from a third party in the chain of hiring for a road project, instead of an uninsured subcontractor. *Jones Bros., Inc. v. Whitlock*, 366 Ark. 254, 234 S.W.3d 864 (2006).

Recovery under this section is not limited solely to amounts due that are lienable. *Jones Bros., Inc. v. Whitlock*, 366 Ark. 254, 234 S.W.3d 864 (2006).

Sole Proprietor Exemption.

Although two sole proprietors exempted themselves from the benefits of coverage under subdivision (a)(B)(i) of this section, they did not exempt their employees; under the clear language of subdivision (a)(B)(ii), a presumption of exemption did not extend to employees of the subcontractors. *Garcia v. A&M Roofing*, 89 Ark. App. 251, 202 S.W.3d 532 (2005).

Cited: *Massey v. Poteau Trucking Co.*, 221 Ark. 589, 254 S.W.2d 959 (1953); *Hollingsworth v. Evans*, 255 Ark. 387, 500 S.W.2d 382 (1973); *Julian Martin, Inc. v. Indiana Refrigeration Lines*, 262 Ark. 671, 560 S.W.2d 228 (1978); *Employers Ins. of Wausau v. Polar Express, Inc.*, 780 F. Supp. 610 (W.D. Ark. 1991); *Cheatham v. 100% Certain Underwriters at Lloyds*, 783 F. Supp. 1174 (E.D. Ark. 1991); *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (Ark. 1998).

11-9-403. Waiver of exclusion or exemption.

(a) Any employer carrying on any exempted or excepted employment may at any time waive the exemptions or exceptions as to any employee or all employees engaged in the employment as the employer may elect by giving notice of waiver of the exemptions or exceptions as provided in subsection (b) of this section.

(b) Notice of waiver of exclusion or exemption referred to in subsection (a) of this section shall be given in accordance with the following provisions:

(1) Every employer who waives the exclusion or exemption shall post, and keep posted, in and about the employer's place of business typewritten or printed notices to that effect in accordance with a form to be prescribed by the Workers' Compensation Commission, and the employer shall file a duplicate of the notice with the commission.

(2) The notice shall be given at least thirty (30) days prior to any injury. However, if the injury occurs less than thirty (30) days after the date of employment, the notice, if given at the time of employment, shall be sufficient notice.

History. Init. Meas. 1948, No. 4, §§ 7, 8, Acts 1949, p. 1420; A.S.A. 1947, §§ 81-1307, 81-1308.

CASE NOTES

ANALYSIS

Credibility.
Notice.

Credibility.

Under the facts of the case, the question of waiver of exemption was a credibility issue; credibility is a matter lying exclusively within the province of the Workers' Compensation Commission. *Stewart v. Cosby-Parsons Quarter Horse Ranch*, 269 Ark. 866, 601 S.W.2d 590 (Ct. App. 1980).

Notice.

Waiver was not ineffective as to claiming employees by reason of employer's

failure to post the notices required by this section or to cover a particular employee with insurance. *McGehee Hatchery Co. v. Gunter*, 237 Ark. 448, 373 S.W.2d 401 (1963).

Cited: *Great Am. Indem. Co. v. Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953); *Muse v. Prescott Sch. Dist.*, 233 Ark. 789, 349 S.W.2d 329 (1961); *French v. Jonesboro Pub. Schs.*, 233 Ark. 879, 349 S.W.2d 670 (1961).

11-9-404. Security for compensation.

(a) Every employer shall secure the payment of compensation under this chapter:

(1) By insuring and keeping insured the payment of the compensation with any carrier authorized to write workers' compensation insurance;

(2)(A) By furnishing satisfactory proof to the Workers' Compensation Commission of the employer's financial ability to pay compensation and receiving an authorization from the commission to pay compensation directly.

(B) The commission, as a condition to such authorization, may require the employer, except municipalities, counties, or the State of Arkansas or its political subdivisions, to deposit in a depository designated by the commission either an indemnity bond, irrevocable letter of credit, or securities of any kind and in an amount determined

by the commission, subject to such reasonable conditions as the commission may prescribe. The conditions shall include authorization to the commission, in case of default, to sell any securities sufficient to pay compensation awards or to bring suit on the bonds or the letter of credit to procure prompt payment of compensation under this chapter.

(C) Any employer securing compensation in accordance with the provisions of this subdivision (a)(2) shall be known as a self-insurer and shall be classed as a carrier of its own insurance.

(D) A self-insurer may have the privilege of securing those portions of the payment of compensation under this chapter as the self-insurer shall elect by insuring the portions with a company approved by the commission. The liability of the company shall be limited to those features and liabilities of this chapter as are expressly stated, and none other;

(3)(A) The commission, under such rules and regulations as it may prescribe, may permit two (2) or more employers engaged in the same type of business activity or pursuit to enter into agreements to pool their liabilities under this section for the purpose of qualifying as self-insurers, and each such approved group shall be classified as an homogeneous self-insurer.

(B)(i) The commission, under such rules and regulations as it may prescribe, may permit two (2) or more employers who are members of the same trade or professional association to enter into agreements to pool their liabilities under this section for the purpose of qualifying as self-insurers, and each such approved group shall be classified as a common self-insurer.

(ii) The trade or professional association shall have been in active existence for at least three (3) years; such associations shall have a constitution or by-laws; and all trustees shall be participants in the common self-insurer program, shall have members that support the association by regular payment of dues on an annual, semiannual, quarterly, or monthly basis, and shall be created in good faith for purposes other than that of creating workers' compensation common self-insurer pools.

(iii) No two (2) trade or professional associations shall be allowed to combine or join each other and qualify as a common self-insurer.

(C) In order to qualify as group self-insurers, these groups shall furnish to or satisfy the commission as to the following:

(i) An application on a form prescribed by the commission by an elected board of trustees to establish a self-insurance fund to be administered under the direction of the trustees;

(ii) The application shall be accompanied by:

(a) An indemnity agreement in a form satisfactory to the commission jointly and severally binding the groups and each member of the groups to comply with the provisions of the Workers' Compensation Law, § 11-9-101 et seq.; and

(b) An individual application by each member of the groups applying for coverage in the fund;

(iii) A current, audited financial statement of each member of the groups showing a combined net worth of all members applying for coverage of not less than one million dollars (\$1,000,000), a combined ratio of current assets to current liabilities of not less than one-to-one, and working capital of an amount establishing financial ability and liquidity sufficient to pay normal compensation claims promptly;

(iv)(a) That the groups deposit and maintain with the commission acceptable securities or have posted a surety bond issued by a corporate surety authorized to do business in the State of Arkansas, in an amount determined by the commission, but not less than two hundred thousand dollars (\$200,000).

(b) However, this subdivision shall not be applicable to municipalities, counties, or the State of Arkansas and its political subdivisions;

(v) That there exist ample facilities and competent personnel of good character within the groups, or through an approved service organization, for the groups to service their own programs with respect to underwriting matters, claims and adjusting, industrial safety engineering, accounting, and financial management;

(vi)(a) That the groups maintain excess insurance with an insurance company authorized to do business in this state in an amount acceptable to the commission.

(b) However, this subdivision (a)(3)(C)(vi) shall not be applicable to municipalities, counties, or the State of Arkansas and its political subdivisions; and

(vii)(a) That such financial statements, payroll records, accident experience, and compensation reports and such other reports and statements are filed at such time and in such manner as the commission shall require.

(b) However, any fund which fails or refuses to file the reports within the time limits prescribed by the commission shall be subject to a civil penalty in such amount as the commission may prescribe not to exceed one hundred dollars (\$100) per infraction per day, and the failure or refusal may be considered good cause for revocation or suspension of self-insurance privileges;

(4) Each member of the groups shall file financial reports and statements at such times and in such manner as the commission may require to satisfy itself as to the continued financial stability of the member; and

(5) In order to continue to qualify as a homogeneous self-insurer fund or common self-insurer fund, the groups shall continue to meet the minimum requirements as set forth in subdivision (a)(3) of this section or as prescribed by the commission.

(b)(1) Except for the initial qualification of the groups, a certified audited financial statement shall not be required of any member of a group either for initial membership or as a condition for continued membership in the group.

(2) However, each financial statement filed with the commission shall be duly certified by the president and treasurer of the member, in

the case of a corporation, and by the owner and general partners, respectively, in the case of an individual proprietorship or partnership, to the effect that such financial statement is true and correct to the best of the knowledge and belief of the officer, individual owner, or partner and truly reflects the financial condition of the member.

(c) Any person who knowingly files a false or fraudulent financial statement under the provisions of this chapter shall, upon conviction, be fined not more than ten thousand dollars (\$10,000) or imprisoned not more than five (5) years, or both.

(d) Jurisdiction for the enforcement of the provisions of this chapter or any appeal therefrom shall be in the Pulaski County Circuit Court. The underlying purpose of this chapter is to assure the payment of benefits due employees, and this chapter shall be liberally construed to that end.

(e)(1) The commission may suspend or revoke any authorization to a self-insurer for a good cause shown after a hearing at which the self-insurer shall be entitled to be heard in person or by counsel and to present evidence.

(2) No suspension or revocation shall affect the liability of any self-insurer already incurred.

(f) Authorization to write compensation insurance under this chapter shall be given to a carrier only after the carrier has received a certificate of authority from the Insurance Commissioner to transact the business of workers' compensation insurance in Arkansas and the commission has been notified in writing of the issuance of the certificate of authority.

History. Init. Meas. 1948, No. 4, § 36, Acts 1949, p. 1420; Acts 1979, No. 994, § 1; 1981, No. 72, § 1; A.S.A. 1947, § 81-1336; Acts 1987, No. 806, §§ 1, 2; 1987,

No. 980, § 1; 1989, No. 821, § 3; 1993, No. 683, § 1; 1995, No. 825, § 1; 2003, No. 468, § 1.

CASE NOTES

ANALYSIS

Insurance Coverage.
Multiple Carriers.

Insurance Coverage.

The employer is required by the state to carry insurance, and the state dictates the rates to be charged. *Wal-Mart Stores, Inc. v. Crist*, 664 F. Supp. 1242 (W.D. Ark. 1987), rev'd, 855 F.2d 1326 (8th Cir. Ark. 1988).

Mere fact of a freight lessor's, a freight carrier's, and a healthcare company's non-compliance with this section, in failing to secure the payment of workers' compensation, did not establish their negligence for purposes of § 11-9-105(b), because an injured truck driver, who sought damages

for a work-related back injury, did not demonstrate that their failure to maintain insurance coverage caused his injury. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

Multiple Carriers.

Where findings of fact by the commission were sufficient to show a series of traumatic injuries during the period of insurance by two carriers of insurance, the judgment of the commission in holding both carriers equally liable for the compensation award was fully justified. *Employers' Cas. Co. v. United States Fid. & Guar. Co.*, 214 Ark. 40, 214 S.W.2d 774 (1948) (decision under prior law).

Cited: *Jenkins v. Jenkins*, 219 Ark. 547, 243 S.W.2d 646 (1951); *French v.*

Grove Mfg. Co., 656 F.2d 295 (8th Cir. 1981); Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325 (8th Cir. 1985); Agricultural Group-Compensation Self-Insurer Fund v. Polk County Circuit Court, 331 Ark. 24, 958 S.W.2d 531 (Ark. 1998).

11-9-405. Substitution of carrier for employer.

(a) In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this chapter may be most effectively discharged by the employer and in order that the administration of this chapter with respect to that liability may be facilitated, the Workers' Compensation Commission shall by regulation provide for the discharge by the carrier, for the employer, of the obligations and duties of the employer with respect to such liability imposed by this chapter upon the employer as it considers proper in order to effectuate the provisions of this chapter.

(b) For such purpose:

(1) Notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier;

(2) Jurisdiction over the employer by the commission or by any court under this chapter shall be jurisdiction over the carrier; and

(3) Any requirements by the commission or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

History. Init. Meas. 1948, No. 4, § 37, Acts 1949, p. 1420; A.S.A. 1947, § 81-1337.

CASE NOTES

ANALYSIS

Jurisdiction.

Tort Actions.

Jurisdiction.

If commission has jurisdiction over alleged employer it also has jurisdiction over employer's insurance carrier. *Andrews v. Gross & Janes Tie Co.*, 214 Ark. 210, 216 S.W.2d 386 (1948) (decision under prior law).

Tort Actions.

An insurer under this section stands in the shoes of the employer and is liable only for obligations of the employer under this chapter and cannot be sued as a third party tortfeasor for injuries to an employee. *Horne v. Security Mut. Cas. Co.*, 265 F. Supp. 379 (E.D. Ark. 1967).

Cited: *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir. 1985).

11-9-406. Failure to secure payment of compensation — Penalty.

(a)(1) Any employer required to secure the payment of compensation under this chapter who fails to secure compensation shall be subject to a fine of up to ten thousand dollars (\$10,000) as determined by the Workers' Compensation Commission payable to the Death and Permanent Total Disability Trust Fund or be guilty of a Class D felony.

(2) This subsection shall not affect any other liability of the employer under this chapter.

(b)(1) Whenever the commission has reason to believe that any employer required to secure the payment of compensation under this chapter has failed to do so, the commission shall serve upon the employer a proposed order declaring the employer to be in violation of this chapter and containing the amount, if any, of the civil penalty to be assessed against the employer pursuant to subdivision (b)(5) of this section.

(2)(A) An employer may contest a proposed order of the commission issued pursuant to subdivision (b)(1) of this section by filing with the commission, within twenty (20) days of receipt of the proposed order, a written request for a hearing.

(B) Such a request for a hearing need not be in any particular form but shall specify the grounds upon which the person contests the proposed order, the proposed assessment, or both.

(C) If a written request for hearing is not filed with the commission within this time, the proposed order, the proposed penalty, or both, shall be a final order of the commission and shall not be subject to further review by any court.

(D) A proposed order by the commission pursuant to this section is *prima facie* correct, and the burden is upon the employer to prove that the proposed order is incorrect.

(3)(A) If the employer alleges that a carrier has contracted to provide it workers' compensation insurance coverage for the period in question, the employer shall include the allegation in its request for hearing and shall name the carrier.

(B) The commission shall promptly notify the carrier of the employer's allegation and of the date of hearing.

(C) The carrier shall promptly, and no later than five (5) days prior to the hearing, respond in writing to the employer's allegation by providing evidence of coverage for the period in question or by affirmatively denying the employer's allegation.

(4) Hearings conducted under this section shall proceed as provided in §§ 11-9-704 — 11-9-711.

(5) The commission may assess a fine against an employer who fails to secure the payment of compensation in an amount up to one thousand dollars (\$1,000) per day of violation payable to the fund.

(6) If an employer fails to secure the payment of compensation or pay any civil penalty assessed against the employer after an order issued pursuant to this section has become final by operation of law or upon appeal, the commission may petition the Pulaski County Circuit Court or of the county where the employer's principal place of business is located for an order enjoining the employer from engaging in further employment until such time as the employer secures the payment of compensation or makes full payment of all civil penalties.

History. Init. Meas. 1948, No. 4, § 39, Acts 1949, p. 1420; A.S.A. 1947, § 81-1339; Acts 1993, No. 796, § 11.

A.C.R.C. Notes. Acts 2001, No. 1757,

§ 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993.

Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

Cited: Laman v. McCord, 245 Ark. 401, 432 S.W.2d 753 (1968); Neal v. Oliver, 246 Ark. 377, 438 S.W.2d 313 (1969).

11-9-407. Posting notice of compliance.

(a) Every employer who has secured compensation under the provisions of this chapter shall keep posted in a conspicuous place in and about the employer's place of business typewritten or printed notices in accordance with a form prescribed by the Workers' Compensation Commission. The notices shall state that the employer has secured the payment of compensation in accordance with the provisions of this chapter.

(b) The notices shall contain the name and address of the carrier, if any, with whom the employer has secured payment of compensation and the date of the expiration of the policy.

History. Init. Meas. 1948, No. 4, § 41, Acts 1949, p. 1420; A.S.A. 1947, § 81-1341.

CASE NOTES

Burden of Proof.

Where claimant testified that he never saw the required form posted anywhere on the employer's premises, it was incumbent on the employer to offer evidence to show that the required notice had been

posted, and in the absence of such evidence employer was estopped from asserting the statute of limitations. Rider v. Julian Martin, Inc., 31 Ark. App. 144, 789 S.W.2d 743 (1990).

11-9-408. Insurance policies.

(a) CONTENTS. Every policy or contract of insurance issued by a carrier to an employer to secure the payment of compensation under this chapter shall contain:

(1)(A) Provisions that identify the insured employer and either identify each covered employee or describe covered employees by class or type of labor performed and the estimated number of employees of each such class or type.

(B) No single policy of workers' compensation insurance may be issued to any group of employers who are unaffiliated with one another in terms of ownership, control, or right to participate in the profits of the affiliated enterprises;

(2) Provisions that insolvency or bankruptcy of the employer or discharge therein shall not relieve the carrier from payment of compensation for compensable injuries sustained by an employee during the term of the policy or contract;

(3)(A) The agreement of the carrier that it will promptly pay to the person entitled to compensation every installment of compensation that may be awarded or agreed upon and that this obligation shall not be affected by any default of the employer or by any default in the giving of any notice required by the policy or otherwise.

(B) The agreement shall be construed to be a direct obligation by the carrier to the person entitled to compensation, enforceable in that person's name; and

(4) Such other provisions as the State Insurance Department allows or requires carriers to include in workers' compensation policies as otherwise provided at the Arkansas Workers' Compensation Insurance Plan, § 23-67-301 et seq.

(b) CANCELLATION.

(1) An employer may cancel coverage with a carrier by giving the carrier at least thirty (30) days' notice, unless a shorter period is permitted under subdivision (b)(1)(B) of this section.

(A) Cancellation of coverage is effective at 12:01 a.m. thirty (30) days after the date the cancellation notice is received by the carrier, unless a later date is specified in the notice to the carrier.

(B)(i) An employer may cancel coverage effective less than thirty (30) days after written notice is received by the carrier where the employer obtains other coverage or becomes a self-insurer.

(ii) A cancellation under this subdivision is effective immediately upon the effective date of the other coverage or upon authorization as a self-insurer.

(2)(A) A notice of cancellation from the carrier shall state the hour and date that cancellation is effective.

(B) A carrier shall not cancel coverage issued to an employer under this chapter prior to the date specified for expiration in the policy or contract or until at least thirty (30) days have elapsed after a notice of cancellation has been mailed to the Workers' Compensation Commission and to the employer, or until ten (10) days have elapsed after the notice has been mailed to the employer and to the commission if the cancellation is for nonpayment of premium.

(C) However, if the employer procures other insurance within the notice period, the effective date of the new policy shall be the cancellation date of the old policy.

(3) Cancellation of coverage by an employer or a carrier shall in no way limit liability that was incurred under the policy or contract prior to the effective date of cancellation.

(c) COVERAGE.

(1) No policy or contract of insurance shall be issued against liability under this chapter unless the policy or contract covers the entire liability of the employer. Split coverage whereby some employees of an employer are insured by one carrier and other employees are insured by another carrier, or by the Arkansas Workers' Compensation Insurance Plan, § 23-67-301 et seq., or a plan of self-insurance is expressly prohibited except for:

(A) A policy issued in accordance with § 23-92-409 so long as all employees performing services for a client are covered under the same policy, contract, or plan; or

(B) A policy issued covering the liability of an employer or of multiple employers as to specific jobs, ventures, contracts, or undertakings, but only if the policy meets with the reasonable satisfaction and approval of the Insurance Commissioner that the policy is in the best interest of the employers and the employees concerned and does not unduly or improperly affect the continuity of workers' compensation coverage by seriously and negatively affecting other carriers and agents with outstanding policies issued to any of the employers in issue.

(2) As to any questions of liability between the employer and the carrier, the terms of the policy or contract shall govern.

(d) Under such rules and regulations as may be adopted by the Insurance Commissioner, and notwithstanding other provisions of this chapter, he or she may certify five (5) or more employers as an insurance group which shall be considered an employer for the purposes of this chapter.

History. Init. Meas. 1948, No. 4, § 38, Acts 1949, p. 1420; Acts 1973, No. 158, § 1; A.S.A. 1947, § 81-1338; Acts 1993, No. 796, § 12; 2003, No. 1750, § 5.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act,

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

Ark. L. Rev. Cancellation of Insurance Contracts, 13 Ark. L. Rev. 360.

Workmen's Compensation — Contractually Required Insurance for Agricultural Laborers, 24 Ark. L. Rev. 385.

CASE NOTES

ANALYSIS

Construction.
Cancellation.
Coverage.
Jurisdiction.
Tort Actions.

Construction.

Although this section is to be strictly construed to the end that employees will not be left without the protection of insurance coverage this rule should not be carried beyond the reason for its existence. Saint Paul Fire & Marine Ins. Co. v. Central Sur. & Ins. Corp., 234 Ark. 160, 350 S.W.2d 685 (1961).

Cancellation.

This section contains two substantive requirements for cancellation of insurance policy — that notice be given and that other insurance be procured. Saint Paul Fire & Marine Ins. Co. v. Central Sur. & Ins. Corp., 234 Ark. 160, 350 S.W.2d 685 (1961).

Cancellation of policy took effect when formal notice to the commission was given, where notice was given after procurement of other policy. Saint Paul Fire & Marine Ins. Co. v. Central Sur. & Ins. Corp., 234 Ark. 160, 350 S.W.2d 685 (1961).

Policy was in force until the commission

approved the cancellation. *Traders & Gen. Ins. Co. v. Henderson*, 235 Ark. 896, 362 S.W.2d 671 (1962).

Subsection (b) of this section requires that one of two conditions precede an effective cancellation when due to nonpayment of premiums — that notice of cancellation be given to both the employer and the Workers' Compensation Commission, or that other insurance be procured within the notice period. *St. Paul Fire & Marine Ins. Co. v. Southwestern Imp., Inc.*, 19 Ark. App. 239, 719 S.W.2d 708 (1986).

The notice of cancellation requirements of subsection (b) of this section are to be strictly construed and applied. *St. Paul Fire & Marine Ins. Co. v. Southwestern Imp., Inc.*, 19 Ark. App. 239, 719 S.W.2d 708 (1986).

The notice sent the employer was ineffective to cancel the insurance policy where the insurer failed also to give notice to the Workers' Compensation Commission pursuant to subsection (b) of this section. *St. Paul Fire & Marine Ins. Co. v. Southwestern Imp., Inc.*, 19 Ark. App. 239, 719 S.W.2d 708 (1986).

This section provides that notice of any cancellation should be sent to "the commission and to the employer"; the statute does not mention that any employee is to receive notice of the cancellation. *Roy Horton Tomato Co. v. Home Ins. Co.*, 683 F. Supp. 714 (E.D. Ark. 1988).

An employee does not have a cause of action against a workers' compensation carrier for fraudulent cancellation of a policy. *Roy Horton Tomato Co. v. Home Ins. Co.*, 683 F. Supp. 714 (E.D. Ark. 1988).

Evidence was sufficient for the jury to find that the insurance company properly cancelled the policy; a reasonable jury could have determined that January 15, 2006, was the effective cancellation date (as the notice of cancellation stated) because the notice was mailed more than 10 days earlier, as required by subdivision (b)(2)(B) of this section. *Triple H Debris Removal, Inc. v. Companion Prop. & Cas. Ins. Co.*, 647 F.3d 780 (8th Cir. 2011).

Coverage.

An employer who conducts two wholly separate and distinct kinds of businesses can become a subscriber for workers' compensation as to one business without insuring his employees in the other busi-

ness, but he cannot insure part of his employees of one business and not insure the remainder of his employees of that business. *Hobbs-Western Co. v. Morris*, 212 Ark. 105, 204 S.W.2d 889 (1947) (decision under prior law).

Where it was clear that the intention of the parties as to insurance coverage prior to renewal was to cover the partners, but the renewal policy issued did not include the members of the partnership, deceased partner's administratrix was entitled to have the policy reformed to include him. *American Cas. Co. v. Hambleton*, 233 Ark. 942, 349 S.W.2d 664 (1961).

The language of subsection (c) is deliberately broad and is intended to cover the employer's "entire liability" to his employees where the employer has taken out a workers' compensation insurance policy. *Southern Farm Bureau Cas. Ins. Co. v. Tuggle*, 270 Ark. 106, 603 S.W.2d 452 (1980); *Arkansas Kraft Vendors v. Horton*, 15 Ark. App. 123, 690 S.W.2d 370 (1985).

Substantial evidence existed in the record to support commission's finding that employer had a policy of workers' compensation in effect at the time of claimant's injury which covered claimant. *Southern Farm Bureau Cas. Ins. Co. v. Tuggle*, 270 Ark. 106, 603 S.W.2d 452 (1980).

Policy which was ambiguous as to who it covered would not be construed to provide coverage for injured employee. *Arkansas Kraft Vendors v. Horton*, 15 Ark. App. 123, 690 S.W.2d 370 (1985).

Evidence sufficient to find that policy provided coverage for the employer's entire liability for company and fulfilled the requirements of subsection (c). *Arkansas Kraft Vendors v. Horton*, 15 Ark. App. 123, 690 S.W.2d 370 (1985).

Jurisdiction.

Action to reform workers' compensation insurance policy was properly brought in chancery court rather than before Workers' Compensation Commission. *American Cas. Co. v. Hambleton*, 233 Ark. 942, 349 S.W.2d 664 (1961).

Tort Actions.

An employer's insurer under this section had no greater liability than the insured employer and was not liable as a third-party tortfeasor for injuries to an employee alleged to have resulted from the failure of the insurer to perform safety

engineering and inspection. *Horne v. Security Mut. Cas. Co.*, 265 F. Supp. 379 (E.D. Ark. 1967).

Cited: *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969); *City of Waldo v. Poet-*

ker, 3 Ark. App. 12, 621 S.W.2d 491 (1981); *Silvicraft, Inc. v. Lambert*, 10 Ark. App. 28, 661 S.W.2d 403 (1983); *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir. 1985).

11-9-409. Safety and health loss control consultative services.

(a) WORKERS' HEALTH AND SAFETY DIVISION.

(1) The Workers' Compensation Commission shall establish a Workers' Health and Safety Division, hereinafter referred to as the "division".

(2) The division shall collect and serve as a repository for statistical information on workers' health and safety. In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall analyze and use the information to identify and assign priorities to safety needs and to better coordinate the safety services provided by public or private organizations, including insurance carriers. In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall promote workers' health and safety through educational programs and other innovative programs developed by the division.

(3) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall coordinate or supervise the collection of information relating to job safety.

(4) The Chair of the Workers' Compensation Commission, the Director of the Department of Labor, and the Insurance Commissioner shall function as an advisory committee to resolve questions regarding duplication of efforts, assignment of new programs, and other matters that need cooperation and coordination.

(5)(A) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall publish or procure and issue educational books, pamphlets, brochures, films, videotapes, and other informational and educational material. Specific educational material shall be directed to high-risk industries and jobs and shall specifically address means and methods of avoiding high frequency but preventable workers' injuries. Other educational material shall be directed to business and industry generally and shall specifically address means and methods of avoiding common workers' injuries.

(B) Specific decisions as to what issues and problems should be addressed by such information shall be made by the division in cooperation and with the assistance of the Department of Labor and the State Insurance Department and with commission approval after assigning appropriate priorities based on frequency of injuries, degree of hazard, severity of injuries, and similar considerations.

(C) Such educational materials shall include specific references to the requirements of state and federal laws and regulations, to recommendations and practices of business, industry, and trade

associations, and, where needed, to recommended work practices based on recommendations made by the division, in cooperation and with the assistance of the Department of Labor and the State Insurance Department, for the prevention of injury.

(6) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall cooperate with employers and employees to develop means and methods of educating employees and employers with regard to workplace safety.

(7) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall encourage other entities to develop safety courses, safety plans, and safety programs.

(8) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall certify safe employers to provide peer review safety programs.

(9) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall advise insurance carrier loss control service organizations of hazard classifications, specific employers, industries, occupations, or geographic regions to which loss control services should be directed or of the identity and types of injuries or occupational diseases for prevention of the same to which loss control services should be directed and shall advise insurance carrier loss control service organizations of safety needs and priorities recommended by the division in cooperation with and with the assistance of the Department of Labor and the State Insurance Department.

(b) JOB SAFETY INFORMATION SYSTEM.

(1) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall establish and maintain a job safety information system.

(2)(A) The job safety information system shall include a comprehensive data base that incorporates all pertinent information relating to each reported injury.

(B) The identity of the employee is confidential and may not be disclosed as part of the job safety information system.

(3) Employers shall file with the commission such reports as may be necessary. The commission shall promulgate rules and prescribe the form and manner of the reports.

(4) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division is authorized, empowered, and directed to obtain, from any state agency, data and statistics, including those compiled for the purpose of rate making.

(5) The division shall consult the Department of Labor and any other affected state agencies in the design of data information and retrieval systems that will accomplish the mutual purposes of those agencies and of the division.

(c) EXTRA-HAZARDOUS EMPLOYER PROGRAM.

(1)(A) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall

develop a program, including injury frequency, to identify extra-hazardous employers. The term "extra-hazardous employer" includes an employer whose injury frequencies substantially exceed those that may reasonably be expected in that employer's business or industry, an employer whose experience modifier is identified by the commission as too high, and such other employers as may, following a public hearing, be identified as extra-hazardous.

(B) The division shall notify each identified extra-hazardous employer or the carrier for the employer that the employer has been identified as an extra-hazardous employer.

(2)(A) An employer who receives notification under subdivision (c)(1)(B) of this section must obtain a safety consultation within thirty (30) days from the Department of Labor, the employer's insurance carrier, or another professional source approved by the division for that purpose.

(B) The safety consultant shall file a written report with the division and the employer setting out any hazardous conditions or practices identified by the safety consultation.

(3) The employer and the consultant shall formulate a specific accident prevention plan that addresses the hazards identified by the consultant. The employer shall comply with the accident prevention plan.

(4) The division may investigate accidents occurring at the work sites of an employer for whom a plan has been formulated under subdivision (c)(3) of this section, and the division may otherwise monitor the implementation of the accident prevention plan as it finds necessary.

(5)(A) Six (6) months after the formulation of an accident prevention plan prescribed by subdivision (c)(3) of this section, the division shall conduct a follow-up inspection of the employer's premises. The division may require the participation of the safety consultant who performed the initial consultation and formulated the safety plan.

(B) If the division determines that the employer has complied with the terms of the accident prevention plan or has implemented other acceptable corrective measures, the division shall so certify.

(C) An employer who the division determines has failed or refused to implement the accident prevention plan or other suitable hazard abatement measures is subject to civil penalties as follows:

(i) The commission may assess a civil penalty against an employer who fails or refuses to implement the accident prevention plan or other suitable hazard abatement procedures in an amount up to one thousand dollars (\$1,000) per day of violation payable to the Death and Permanent Total Disability Trust Fund; and

(ii) Furthermore, the commission may petition the Pulaski County Circuit Court, or of the county where the business is located, for an order enjoining the employer from engaging in further employment until such time as the employer implements the prevention plan or abatement measure described above or makes payment of all civil penalties.

(6) If, at the time of the inspection required under subdivision (c)(5)(A) of this section, the employer continues to exceed the injury frequencies that may reasonably be expected in that employer's business or industry, the division shall continue to monitor the safety conditions at the work site and may formulate additional safety plans reasonably calculated to abate hazards. The employer shall comply with the plans and may be subject to additional penalties for failure to implement the plan or plans.

(7) An employer may request a hearing before the full commission to contest findings made by the division under this section.

(8) The identification as an extra-hazardous employer under this section is not admissible in any judicial proceeding unless the commission has determined that the employer is not in compliance with this section and unless that determination has not been reversed or superseded at the time of the event giving rise to the judicial proceeding.

(d) ACCIDENT PREVENTION SERVICES.

(1) Any insurance company licensed to provide casualty insurance in the State of Arkansas and desiring to write workers' compensation insurance in Arkansas shall maintain or provide accident prevention services as a prerequisite to write workers' compensation insurance. The services shall be adequate to furnish accident prevention programs required by the nature of its policyholders' operations and shall include surveys, recommendations, training programs, consultations, analyses of accident causes, industrial hygiene, and industrial health services to implement the program of accident prevention services.

(2) Notice that services are available to the policyholder from the insurance company must appear in no less than ten-point bold type on the front of each workers' compensation insurance policy delivered or issued for delivery in the state.

(3) At least once each year, each insurance company writing workers' compensation insurance in Arkansas must submit to the division detailed information on the type of accident prevention services offered to that insurance company's policyholders. The information must include any additional information required by the commission.

(4) In cooperation with and with the assistance of the Department of Labor and the State Insurance Department, the division shall conduct inspections to determine the adequacy of the accident prevention services required by subdivision (d)(1) of this section at least every two (2) years for each insurance company writing workers' compensation insurance in Arkansas.

(5) If the insurance company does not maintain or provide the accident prevention services required by this subsection or if the insurance company does not use the services in a reasonable manner to prevent injury to employees of its policyholders, the insurance company may be subjected to the same civil penalties as are assessable and enforceable against employers as set forth above in subdivision (c)(5)(C) of this section and shall be subject to suspension or revocation of license to do business in this state by the Insurance Commissioner.

(6) The commission shall employ the qualified personnel necessary to enforce this section.

(e) IMMUNITY FROM CERTAIN LIABILITY.

(1) Except as provided in subdivision (d)(5) of this section, the insurance company, the agent, servant, or employee of the insurance company or self-insured employer, or a safety consultant who performs a safety consultation under this section shall have no liability with respect to any accident based on the allegation that the accident was caused or could have been prevented by a program, inspection, or other activity or service undertaken by the insurance company or self-insured employer for the prevention of accidents in connection with operations of the employer.

(2) Provided, however, this immunity shall not affect the liability of the insurance carrier or self-insured employer for compensation or as otherwise provided in this chapter.

(f) EXCLUSIVE REMEDY. This section does not create an independent cause of action at law or in equity.

History. Acts 1993, No. 796, § 13; 2005, No. 505, § 4.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Acts 2010, No. 129, § 8, provided: "QUARTERLY REPORTS. Due to the critical role of the Health and Safety and Medical Cost Containment Programs to the overall programs of the Workers' Compensation Commission (WCC), the WCC shall provide quarterly reports to the Arkansas Legislative Council and to the House and Senate Committees on Public

Health, Welfare, and Labor on the progress of the Health and Safety Program and the Medical Cost Containment Program, in such detail as may be required by either body. These reports shall be posted on the agency's web page.

"The provisions of this section shall be in effect only from July 1, 2010 through June 30, 2011."

Publisher's Notes. Former § 11-9-409, concerning risks rejected by insurance companies and assignment thereof by the commission, was repealed by Acts 1991, No. 561, § 4. The section was derived from Init. Meas. 1948, No. 4, § 9; Acts 1949, p. 1420; Acts 1975, No. 174, § 1; 1983, No. 769, § 1; A.S.A. 1947, § 81-1309.

CASE NOTES

ANALYSIS

Applicability.

Private Right of Action.

Applicability.

Insurer not immune under subsection (e) of this section where the injury occurred before July 1, 1993. *Wilson v. Reb-*

samen Ins., Inc., 330 Ark. 687, 957 S.W.2d 678 (1997).

Private Right of Action.

The statute does not grant a claimant the right to bring a claim seeking to establish an employer as an extra-hazardous employer. *Vittitow v. Central Maloney*, 69 Ark. App. 176, 11 S.W.3d 12 (2000).

11-9-410. Third-party liability.

(a) **LIABILITY UNAFFECTED.** (1)(A) The making of a claim for compensation against any employer or carrier for the injury or death of an employee shall not affect the right of the employee, or his or her dependents, to make a claim or maintain an action in court against any third party for the injury, but the employer or the employer's carrier shall be entitled to reasonable notice and opportunity to join in the action.

(B) If they, or either of them, join in the action, they shall be entitled to a first lien upon two-thirds ($\frac{2}{3}$) of the net proceeds recovered in the action that remain after the payment of the reasonable costs of collection, for the payment to them of the amount paid and to be paid by them as compensation to the injured employee or his or her dependents.

(2) The commencement of an action by an employee or his or her dependents against a third party for damages by reason of an injury to which this chapter is applicable, or the adjustment of any claim, shall not affect the rights of the injured employee or his or her dependents to recover compensation, but any amount recovered by the injured employee or his or her dependents from a third party shall be applied as follows:

(A) Reasonable costs of collection shall be deducted;

(B) Then, in every case, one-third ($\frac{1}{3}$) of the remainder shall belong to the injured employee or his or her dependents, as the case may be;

(C) The remainder, or so much as is necessary to discharge the actual amount of the liability of the employer and the carrier; and

(D) Any excess shall belong to the injured employee or his or her dependents.

(b) **SUBROGATION.** (1) An employer or carrier liable for compensation under this chapter for the injury or death of an employee shall have the right to maintain an action in tort against any third party responsible for the injury or death. However, the employer or the carrier must notify the claimant in writing that the claimant has the right to hire a private attorney to pursue any benefits to which the claimant is entitled in addition to the subrogation interest against any third party responsible for the injury or death.

(2) After reasonable notice and opportunity to be represented in the action has been given to the compensation beneficiary, the liability of the third party to the compensation beneficiary shall be determined in the action, as well as the third party's liability to the employer and carrier.

(3)(A) After recovery shall be had against the third party, by suit or otherwise, the compensation beneficiary shall be entitled to any amount recovered over and above the amount that the employer and carrier have paid or are liable for in compensation, after deducting reasonable costs of collection.

(B) In no event shall the compensation beneficiary be entitled to less than one-third ($\frac{1}{3}$) of the amount recovered from the third party, after deducting the reasonable cost of collection.

(4) An employer or carrier who is liable for compensation under this chapter on account of injury or death of an employee shall be entitled to maintain a third party action against the employer's uninsured motorist coverage or underinsured motorist coverage.

(5) The purpose and intent of this subsection is to prevent double payment to the employee.

(c) **SETTLEMENT OF CLAIMS.** (1) Settlement of claims under subsections (a) and (b) of this section must have the approval of the court or of the Workers' Compensation Commission, except that the distribution of that portion of the settlement that represents the compensation payable under this chapter must have the approval of the commission.

(2) Where liability is admitted to the injured employee or his or her dependents by the employer or carrier, the cost of collection may be deducted from that portion of the settlement under subsections (a) or (b) of this section representing compensation, upon direction and approval of the commission.

(3) No party shall settle a claim under subsections (a) and (b) of this section without first giving three (3) days' written notice to all parties with an interest in the claim of the intent to settle.

(4) Each party with an interest in a claim under subsections (a) and (b) shall cooperate with all other parties in litigation or settlement of such claims.

History. Init. Meas. 1948, No. 4, § 40, Acts 1949, p. 1420; A.S.A. 1947, § 81-1340; Acts 1993, No. 796, § 14.

A.C.R.C. Notes. As originally enacted by Acts 1993, No. 796, § 14, subsection (b)(4) contained an additional sentence which read: "Any and all case law inconsistent herewith is specifically annulled". and subsection (c) contained a subdivision (4) which read: "The purpose and intent of the reenactment of this statute is to annul any and all case law inconsistent here-

with."

Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Cross References. Exclusivity of workers' compensation remedies, § 11-9-105.

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ANALYSIS

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In General.

This chapter does not give or create a cause of action against a third party causing a compensable injury to the employee but only makes it plain that the common law remedy as the employee already had against tortfeasors prior to the enactment of the chapter was fully preserved and left unchanged when the tortfeasor is other than the employer. *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969).

This section provides that, even though an employee draws worker's compensation benefits, he is not precluded from making a separate claim or maintaining a separate cause of action against a third

party causing the injuries. *Simpson v. Liberty Mut. Ins. Co.*, 816 F. Supp. 1348 (W.D. Ark. 1993).

This section provides two methods for pursuing a third-party claim or cause of action: the employee may pursue the claim and make a recovery or, if he chooses not to do so, the employer or carrier may do so. In either event, the employee is to receive at least one third of the amount received, calculated after payment of costs of collection, and the employer or carrier, if there is enough remaining, is to be reimbursed for the workers' compensation benefits paid. *Simpson v. Liberty Mut. Ins. Co.*, 816 F. Supp. 1348 (W.D. Ark. 1993).

This section creates one cause of action, but two separate claims, one belonging to the employee and the other belonging to the employer or insurance carrier for the employer. *Simpson v. Liberty Mut. Ins. Co.*, 816 F. Supp. 1348 (W.D. Ark. 1993).

Where a third-party tort action was filed against a company based on the allegation that claimant was a special employee of the company, in granting a writ of prohibition the Court implicitly held that the special employee issue was to be decided by the Arkansas Workers' Compensation Commission as it had exclusive, original jurisdiction to determine the applicability of the Arkansas Workers' Compensation Act. *Nucor Corp. v. Rhine*, 366 Ark. 550, 237 S.W.3d 52 (2006).

Construction.

This section is vague and ambiguous and, therefore, the courts will consider the decisions of other jurisdictions to determine its real meaning. *Boulden v. Her-ring*, 126 F. Supp. 885 (W.D. Ark. 1954), *aff'd*, 227 F.2d 303 (8th Cir. Ark. 1955).

Subdivision (a)(1) of this section does not grant the employer and carrier any right of recovery but, instead, only provides a means for securing the right given by other sections of this section. *Simpson v. Liberty Mut. Ins. Co.*, 816 F. Supp. 1348 (W.D. Ark. 1993).

When subdivision (a)(1) of this section gives a carrier the right to intervene, the carrier may intervene as a matter of right under ARCP 24(a). *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

Applicability.

This section does not apply to suits brought under the Wrongful Death Act, § 16-62-102. *Maryland Cas. Co. v. Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974).

Acceptance of workers' compensation payments pursuant to this chapter does not mean that Arkansas automatically has the most significant relationship in determining the procedures of third-party tort settlement; acceptance of workers' compensation payments from a state does not mean that the parties made an election to accept the procedures of third-party settlement pursuant to that state's law. *Simpson v. Liberty Mut. Ins. Co.*, 28 F.3d 763 (8th Cir. 1994).

Compensation and Tort Claims Separate.

The recovery of a claim for compensation does not affect the employee's right to maintain a tort action against any third person responsible for the injury whether the act of the third person be willful or merely negligent. *Heskett v. Fisher Laundry & Cleaners Co.*, 217 Ark. 350, 230 S.W.2d 28 (1950); *Baldwin Co. v. Maner*, 224 Ark. 348, 273 S.W.2d 28 (1954), superseded by statute as stated in, *Stapleton v. M.D. Limbaugh Constr. Co.*, 333 Ark. 381, 969 S.W.2d 648 (Ark. 1998).

Where administrator of deceased worker had cause of action for wrongful death against third-party tortfeasor, his cause of action and that of compensation carrier of employer for reimbursement for death benefits paid were separate causes. *Winfrey & Carlile v. Nickles*, 223 Ark. 894, 270 S.W.2d 923 (1954).

Employee who had received workers' compensation benefits in another state was not precluded against third party responsible for accident in Arkansas even

though the other state's workers' compensation law provided that employee would be conclusively presumed to have elected to accept its provisions unless prior to the accident he had filed with compensation commission a written notice that he elected to reject the other state's law. *Carroll v. Lanza*, 349 U.S. 408, 75 S. Ct. 804 (1955).

Fact that person has been compensated to some extent through this chapter would not benefit defendant so as to reduce the damages in the tort action. *Swindle v. Thornton*, 229 Ark. 437, 316 S.W.2d 202 (1958).

The making of a claim for compensation does not affect the right of the employee or his dependents to maintain an action against a fellow employee whose negligence caused the accident. *King v. Cardin*, 229 Ark. 929, 319 S.W.2d 214 (1959).

Workers' Compensation Commission and trial court erred in refusing to consider claim on ground that the accident happened in another state and that state's law was controlling as to allowance of benefits, as recovery in tort from third party for such injury does not bar recovery of workers' compensation in Arkansas, although law of other state forbids such recovery. *Gentry v. Jett*, 235 Ark. 20, 356 S.W.2d 736 (1962).

Plaintiff's recovery from the insurer was not subject to reduction by the amount of workers' compensation paid plaintiff by his employer, but the employer was entitled to the amount so paid by him out of plaintiff's recovery. *Jones v. Morrison*, 284 F. Supp. 1016 (W.D. Ark. 1968).

Where employee voluntarily refunded compensation amounts prior to bringing personal injury claim, the refunded amounts belonged to the employee and not to the carrier and employee was entitled to them even though period of limitations for compensation claims had expired. *Bryan v. Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969).

Under this section, the receipt by plaintiff of workers' compensation did not affect her right to recover full compensation from the third-party defendant. *Rhoads v. Service Machine Co.*, 329 F. Supp. 367 (E.D. Ark. 1971).

The statement in *Winfrey & Carlile v. Nickles*, 223 Ark. 894, 270 S.W.2d 923 (1954), that this section recognizes separate causes of action in the compensation

carrier, should not be taken to mean that the single cause of action against the tortfeasor might be split, for that statement relates to the separate rights of the beneficiary and carrier to institute the action against the tortfeasor. *Amos v. Stroud*, 252 Ark. 1100, 482 S.W.2d 592 (1972).

Costs of Collection.

Subdivision (a)(2)(A) does not require a compensation carrier in all instances to participate in the payment of reasonable costs of collection of a personal injury claim, including attorney's fees; rather, this section provides only that reasonable costs of collection shall first be deducted from the gross amount received, before the net amount is allocated between the claimant and subrogee. The statute clearly does not provide for splitting of the gross sum in order to make a pro rata allocation of the costs of collection from both the claimant and the insurance carrier. *Public Employee Claims Div. v. Chitwood*, 324 Ark. 30, 918 S.W.2d 163 (1996).

—In General.

The existence of an alleged contract between employee and employer's insurance carrier calling for a contribution by the carrier, as part of the costs of collection of one third of the amount the carrier was entitled to receive in the settlement was a matter over which commission had no jurisdiction. *Maxcy v. John F. Beasley Constr. Co.*, 228 Ark. 253, 306 S.W.2d 849 (1957).

—Attorney's Fees.

In a suit by an employee against a third-party tortfeasor, the employee's attorney's fees are to be deducted from the total recovered before an employer's insurer recovers for past and future workers' compensation payments, even though the insurer admitted liability where there is a contested case. *Boulden v. Herring*, 126 F. Supp. 885 (W.D. Ark. 1954), *aff'd*, 227 F.2d 303 (8th Cir. Ark. 1955).

Attorney for administrator of deceased worker, where successful in suit against third-party tortfeasor, was not only entitled to contingent fee on the one-third share of administrator but on the two-thirds share of the compensation carrier who intervened in action in order to claim its statutory share of proceeds as reimbursement of death benefits paid. *Winfrey*

& *Carlile v. Nickles*, 223 Ark. 894, 270 S.W.2d 923 (1954).

Contingent fee contract between administrator of deceased worker's estate and attorney hired by him to bring wrongful death action was not binding upon compensation carrier who had intervened to claim share of recovery as reimbursement for death benefits paid. *Winfrey & Carlile v. Nickles*, 223 Ark. 894, 270 S.W.2d 923 (1954).

It is for the court and not the commission to determine reasonable compensation for legal services performed in suit against third-party tortfeasor although court, by agreement of parties, referred question of distribution of recovered funds to commission for determination. *Winfrey & Carlile v. Nickles*, 223 Ark. 894, 270 S.W.2d 923 (1954).

In action against third-party tortfeasor, beneficiary would be required to pay his attorney out of his share of the recovery in accordance with his contract with the attorney and subrogated insurance carrier would be required to pay its attorneys out of their share of the recovery in accordance with its contract. *Saint Paul-Mercury Indem. Co. v. Lanza*, 131 F. Supp. 684 (W.D. Ark. 1955), *aff'd*, 232 F.2d 747 (8th Cir. Ark. 1956).

Attorney's fees are not part of the "costs of collection" which are to be deducted before beneficiary's share of recovery against third-party tortfeasor is paid over. *Saint Paul-Mercury Indem. Co. v. Lanza*, 131 F. Supp. 684 (W.D. Ark. 1955), *aff'd*, 232 F.2d 747 (8th Cir. Ark. 1956).

In action against third-party tortfeasor, beneficiary had no power to reject services of attorneys of insurance carrier who was subrogated to rights of beneficiary to the extent of benefits paid by the carrier and fees of the attorneys were not deductible from beneficiary's portion of recovery in absence of express or implied contract between the attorneys and beneficiary. *Saint Paul-Mercury Indem. Co. v. Lanza*, 131 F. Supp. 684 (W.D. Ark. 1955), *aff'd*, 232 F.2d 747 (8th Cir. Ark. 1956).

Where employee and third party effected voluntary settlement without trial of claim arising out of injury to employee occasioned by act of third party, Workers' Compensation Commission had the right to approve allowance of employee's attorney's fee and other reasonable costs of collection. *Maxcy v. John F. Beasley Con-*

str. Co., 228 Ark. 253, 306 S.W.2d 849 (1957).

Employee was entitled to have the fee of his attorney deducted from the recovery as expense of collection before computing the carrier's lien on two-thirds of the recovery. *Phillips v. Morton Frozen Foods*, 313 F. Supp. 228 (E.D. Ark. 1970).

Where the employer employed its own attorney to pursue the estate of the third-party tortfeasor, the trial court did not commit error in refusing to allow attorney fees for the employee's attorney as costs of collection of the third-party claim under this section; the court should simply apportion the recovery, leaving each to pay his or her own attorney. *Orintas v. Meadows*, 17 Ark. App. 214, 706 S.W.2d 199 (1986).

Because attorney's contingency fee and costs were initially deducted from the full amount of the third-party judgment before either the injured employee or the workers' compensation insurance carrier were distributed their respective statutory awards under subdivision (a)(2), the insurance carrier effectively paid its proportionate share of attorney's fees in the employee's third-party action, and no additional attorney's fee was provided by law. *Continental Cas. Co. v. Sharp*, 312 Ark. 286, 849 S.W.2d 481 (1993).

Whether or not the cost of collection includes the fee for the employee's attorney on the entire settlement or recovery must be judged on the facts of each case and depends on whether or not the workers' compensation carrier has reached an agreement with the employee's attorney to represent its interest in the third-party action, whether the carrier has had its own attorney participate in the third-party action, or whether the carrier has sat back and allowed the employee's attorney to do all the work and either settle the case or proceed to trial, waiting until a sum is recovered by the employee's attorney before stepping in to take its subrogation amount without any compensation to the attorney responsible for the recovery. *Hatten v. Little Rock Dodge & Chrysler Ins. Corp.*, 47 Ark. App. 147, 886 S.W.2d 891 (1994).

Employer's or Carrier's Share of Recovery.

This section does not really give the employer or carrier two-thirds of the total

net proceeds recovered; instead, it only gives them what they have paid, but under no circumstances shall they receive more than two-thirds of the net recovery irrespective of whether that fully reimburses them or not. *Simpson v. Liberty Mut. Ins. Co.*, 816 F. Supp. 1348 (W.D. Ark. 1993).

Although the employee may "settle around" the insurance carrier by splitting off and putatively settling only his cause of action, he may not settle and get paid for both of the claims without expecting to reimburse the carrier for the portion of the settlement belonging to it. *Simpson v. Liberty Mut. Ins. Co.*, 816 F. Supp. 1348 (W.D. Ark. 1993).

Where claimant failed to institute judicial proceedings prior to entering a settlement agreement with a third party, respondent compensation carrier was denied their statutory right to reasonable notice and an opportunity to intervene in an action in court and was, therefore, entitled to credit to the extent of the lien provided for in subdivision (a)(1). *Wentworth v. Sparks Regional Medical Ctr.*, 58 Ark. App. 242, 950 S.W.2d 221 (1997).

Employer was not entitled to a lien or credit for the amounts it paid or would have to pay due to the claimant's injury that occurred within his scope of employment and involved the third party; claimant was not "make whole" by the settlement with the third party as is required before a lien or credit will be permitted. *Phillip Morris USA v. James*, 79 Ark. App. 72, 83 S.W.3d 441 (2002).

Immunity.

Arkansas Workers' Compensation Commission erred in concluding that it had jurisdiction over an employee's tort claims against a corporation and its owner, and in deciding that the corporation and owner were immune under § 11-9-105(a) because there was no employment relationship between the employee and the corporation and owner. *Johnson v. Ark. Steel Erectors*, 2009 Ark. App. 755, 350 S.W.3d 801 (2009).

Indemnity.

In the absence of a contract for indemnity running in favor of the third party, this section controls and negligent third-party tortfeasor is not entitled to indemnity or contribution from a negligent em-

ployer where their concurrent negligence has produced the injury or death of the employee. *Dulin v. Circle F Indus., Inc.*, 558 F.2d 456 (8th Cir. 1977).

Even in the absence of an express contract for indemnity, a third party will have indemnity from a negligent employer where the liability that has been imposed upon the third party is purely vicarious and without fault on his part. *Dulin v. Circle F Indus., Inc.*, 558 F.2d 456 (8th Cir. 1977).

Where there is no contract at all, much less an express contract of indemnity, the parties are nothing more than joint tortfeasors, and the employer is immune from any claim of contribution or indemnity. *Elk Corp. of Arkansas v. Builders Transport, Inc.*, 862 F.2d 663 (8th Cir. 1988).

Intervention.

Neither the employer nor its insurance carrier is admitting liability when it intervenes in a third-party action under this section. By intervening, they are merely preserving their right to a lien of two-thirds of the proceeds paid to the employee-claimant as a credit against their compensation exposure. *Jackson Cookie Co. v. Fausett*, 17 Ark. App. 76, 703 S.W.2d 468 (1986).

Where the employee has made a claim under this chapter and the employer or carrier has had reasonable notice and an opportunity to join in a third-party action, the employer and its carrier must intervene in a third-party action in order to have a right to a credit, whether or not the liability of the employer or the carrier has been determined. *Jackson Cookie Co. v. Fausett*, 17 Ark. App. 76, 703 S.W.2d 468 (1986).

Employer had an unconditional right to intervene in its injured employees' suit against a company the employees were working for as independent contractors, and it was error for the trial court to have denied the employer that right where the right to intervene to protect subrogation rights did not require the default judgment against the employer to have been set aside; however, although subdivision (a)(1)(A) of this section entitled the employer to reasonable notice to join in the action to protect only its subrogation right, it did not entitle the employer to reasonable notice to join in the action to protect its interest under the indemnifica-

tion and hold harmless agreement. *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004).

Joinder.

Where workers' compensation insurance carrier filed suit pursuant to this section against a third-party tortfeasor without joining the workers' compensation beneficiaries, who were necessary parties, the court properly sustained demurrer on basis that carrier lacked the legal capacity to sue but committed reversible error when it refused the carrier the opportunity to amend its complaint following dismissal of the complaint. *United States Fid. & Guar. Co. v. Glass*, 261 Ark. 45, 545 S.W.2d 924 (1977).

Jurisdiction.

The existence of an alleged contract between employee and employer's insurance carrier calling for a contribution by the carrier, as part of the costs of collection of one third of the amount the carrier was entitled to receive in the settlement was a matter over which commission had no jurisdiction. *Maxcy v. John F. Beasley Constr. Co.*, 228 Ark. 253, 306 S.W.2d 849 (1957).

A circuit court had subject matter jurisdiction to award payment to an insurance carrier and to determine what constituted compensation under the Workers' Compensation Act pursuant to this section. *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997).

Liability.

—In General.

Where an insurer paid workers' compensation payments to an employee while alive but delayed payments after death only to get a report from their doctor as to the cause of death, the insurer admitted liability under this section. *Boulden v. Herring*, 126 F. Supp. 885 (W.D. Ark. 1954), *aff'd*, 227 F.2d 303 (8th Cir. Ark. 1955).

Insurer was liable as a third-party tortfeasor to a worker alleged to have been injured as the result of failure of insurer to perform safety engineering and inspection. *Horne v. Security Mut. Cas. Co.*, 265 F. Supp. 379 (E.D. Ark. 1967).

An employee may be liable as a third-party tortfeasor in a workers' compensation case. *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969).

Evidence insufficient to find contractor or subcontractor liable as third-party tortfeasors for injuries sustained by employee of sub-subcontractor. *Kennedy v. United States Constr. Co.*, 545 F.2d 81 (8th Cir. 1976).

Subject to a few narrow exceptions, an employer is immune from liability for damages in a tort action brought by an injured employee. *Fore v. Circuit Court*, 292 Ark. 13, 727 S.W.2d 840 (1987), overruled in part, *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (Ark. 1993), overruled, *Wise Co. v. Clay Circuit*, 315 Ark. 333, 869 S.W.2d 6 (Ark. 1993), overruled in part, *Wise Co. v. Clay Circuit*, 315 Ark. 336A, — S.W.2d — (1994).

—Supervisors.

Liability on the basis of a willful and malicious act by an employer's supervisor will not render the employer liable to the employee in tort. *Fore v. Circuit Court*, 292 Ark. 13, 727 S.W.2d 840 (1987), overruled in part, *Lupo v. Lineberger*, 313 Ark. 315, 855 S.W.2d 293 (Ark. 1993), overruled, *Wise Co. v. Clay Circuit*, 315 Ark. 333, 869 S.W.2d 6 (Ark. 1993), overruled in part, *Wise Co. v. Clay Circuit*, 315 Ark. 336A, — S.W.2d — (1994).

Supervisory as well as non-supervisory employees are immune from suit for negligence in failing to provide a safe place to work. *Allen v. Kizer*, 294 Ark. 1, 740 S.W.2d 137 (Ark. 1987); *Barnes v. Wilkie-wicz*, 301 Ark. 175, 783 S.W.2d 36 (1990).

Lien.

Plaintiff was limited to only one recovery for all damages and he could not, by electing to sue only for mental pain and suffering and disfigurement, defeat the lien of the insurance carrier on recovery. *Barth v. Liberty Mut. Ins. Co.*, 212 Ark. 942, 208 S.W.2d 455 (1948) (decision under prior law).

Since a manner and method of perfecting the employer's lien on the proceeds is provided, the third-party tortfeasor should have every right to proceed according to the common law as if no employer were involved until such time as the lien is perfected. *Hartford Ins. Group v. Carter*, 251 Ark. 680, 473 S.W.2d 918 (1971) Limited by *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (Ark. 1972).

When an insured recovered on a tort claim from a third party by way of settle-

ment, the workers' compensation carrier was entitled to an amount up to two-thirds of the amount recovered, but was not entitled to a lien against recovery of uninsured motorist proceeds. *Courson v. Maryland Cas. Co.*, 475 F.2d 1030 (8th Cir. 1973).

Where deceased employee's parents bring suit for wrongful death and are neither dependents of the employee nor compensation beneficiaries, then neither the employer nor the insurance carrier has a lien on the moneys recovered from tortfeasor. *Maryland Cas. Co. v. Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974).

Where the settlement of an injured employee with a third-party tortfeasor provided that the release given by the employee would not affect the subrogation rights of the employer's compensation carrier, the compensation carrier was not entitled to a lien upon the proceeds of the settlement. *St. Paul Fire & Marine Ins. Co. v. Wood*, 242 Ark. 879, 416 S.W.2d 322 (1967).

The employer and its insurer waive their right to claim a lien or credit against the proceeds from a settlement reached by the employee and a third-party tortfeasor by failing to intervene in the third-party action, notwithstanding the absence of approval by the Workers' Compensation Commission or the court, or the preservation of their subrogation rights. *John Garner Meats v. Ault*, 38 Ark. App. 111, 828 S.W.2d 866 (1992).

This section provides not only for the intervening carrier's lien upon proceeds received in an action against a third party, but also spells out how the carrier's entitlement shall be computed. *Public Employee Claims Div. v. Chitwood*, 324 Ark. 30, 918 S.W.2d 163 (1996).

An insurance carrier was entitled to a statutory lien on sums recovered by a claimant from a third-party tortfeasor. *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997).

An insurer-carrier's lien right against an insured's settlement with a third-party defendant is not necessarily "absolute"; rather, the settlement is subject to a court's approval after the carrier has been afforded adequate opportunity to be heard. *General Accident Ins. Co. v. Jaynes*, 343 Ark. 143, 33 S.W.3d 161 (2000).

In an action arising from a fatal automobile accident, the trial court did not err in refusing to enforce the lien right of the decedent's employer's workers's compensation carrier on the ground that the decedent's beneficiaries and survivors were not made whole by a settlement of the action. *General Accident Ins. Co. v. Jaynes*, 343 Ark. 143, 33 S.W.3d 161 (2000).

Payment of Claims.

Trial court's dismissal of claim against insurers who had already paid workers' compensation benefits with respect to claim was proper. *Burkett v. PPG Indus., Inc.*, 294 Ark. 50, 740 S.W.2d 621 (1987).

Release.

Release pursuant to consent judgment held to estop heirs covered by its terms but not spouse excluded from it. *Jenkins v. Jenkins*, 219 Ark. 547, 243 S.W.2d 646 (1951).

A release executed by an employee to a third-party tortfeasor before the filing of a workers' compensation claim was a defense to the employer's subsequent action against the tortfeasor brought pursuant to subsection (b). *Hartford Ins. Group v. Carter*, 251 Ark. 680, 473 S.W.2d 918 (1971) Limited by *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (Ark. 1972).

Settlement of Claims.

In a suit by an employee against a third-party tortfeasor, where the employee's attorney obtained a settlement by the use of the federal pretrial rules with a judgment to bind the settlement, the reasonableness of the settlement and the attorney fees should have been determined by the federal trial court judge rather than the commission. *Boulden v. Herring*, 126 F. Supp. 885 (W.D. Ark. 1954), *aff'd*, 227 F.2d 303 (8th Cir. Ark. 1955).

A settlement by the use of the federal pretrial rules with a judgment to bind the settlement was a "contested case" under this section, which gives the attorney's fees priority over the workers' compensation insurer's subrogation claims. *Boulden v. Herring*, 126 F. Supp. 885 (W.D. Ark. 1954), *aff'd*, 227 F.2d 303 (8th Cir. Ark. 1955).

Word "settlement" means compromise settlement, and this section had no appli-

cation where amount recovered was by judgment on verdict in suit against third-party tortfeasor and court approved deduction from proceeds. *Winfrey & Carlile v. Nickles*, 223 Ark. 894, 270 S.W.2d 923 (1954).

For cases discussing apportionment of settlement in specific cases, see *Maxcy v. John F. Beasley Constr. Co.*, 228 Ark. 253, 306 S.W.2d 849 (1957); *Courson v. Maryland Cas. Co.*, 475 F.2d 1030 (8th Cir. 1973).

Since subsection (c) is not applicable to third-party tortfeasors, agreements between the injured employees and third persons need not be approved by the court. *Hartford Ins. Group v. Carter*, 251 Ark. 680, 473 S.W.2d 918 (1971) Limited by *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (Ark. 1972).

The purpose of subsection (c) is to permit the adjustment of controversies between the employee and employer and to require that settlements between them have the approval of either the court or the Workers' Compensation Commission to prevent an employee from compromising his claims through his tort action in a manner that would not be permitted under this chapter as by way of joint petition. *Hartford Ins. Group v. Carter*, 251 Ark. 680, 473 S.W.2d 918 (1971) Limited by *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (Ark. 1972).

Since the statutory purpose of this section is to protect the rights of both the compensation carrier and employee as between an employer or compensation carrier and employee, the proceeds of any compromise settlement of a tort claim is subject to the lien of the employer or the compensation carrier unless settlement has been approved by a court having jurisdiction or by Workers' Compensation Commission, after the carrier has been afforded adequate opportunity to be heard. *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (Ark. 1972).

Compensation carrier that paid benefits to injured employee could not claim proceeds of a compromise settlement of a tort claim where it was conditioned upon and specifically recognized carrier's subrogation rights. *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (Ark. 1972).

Settlement held properly approved. *Froman v. Southern Farm Bureau Cas. Ins. Co.*, 528 F.2d 24 (8th Cir. 1976).

Employee and third-party tortfeasor may settle "around" the employer and its liability carrier, despite this section, where the settlement preserves the right of employer's carrier to proceed against the tortfeasor. *Bituminous Ins. Co. v. Georgia-Pacific Corp.*, 2 Ark. App. 245, 620 S.W.2d 304 (1981); *New Hampshire Ins. Co. v. Keller*, 3 Ark. App. 81, 622 S.W.2d 198 (1981).

An employee and a third party tortfeasor may settle the employee's claim and putatively leave the workers' compensation carrier to pursue its claim separately if it desires, at least so long as the settlement is made prior to judgment; to do so does not violate the rule against splitting of causes of action because the third party for whose benefit the rule was designed has agreed to it. *Commercial Union Ins. Co. v. Suitt Constr. Co.*, 673 F. Supp. 320 (E.D. Ark. 1987), *aff'd* without op., 860 F.2d 1087 (8th Cir. Ark. 1988).

The Worker's Compensation statute does not afford the carrier the right to veto any compromise with a third party which is not to its liking. *International Paper Co. v. Wilson*, 34 Ark. App. 87, 805 S.W.2d 668 (1991).

The district court did not abuse its discretion when it approved the settlement between the employee and the corporation and denied the employer's motion for reconsideration because the Arkansas judicial doctrine under which the injured employee and the third party tortfeasor could settle around the employer's statutory lien provided that its subrogation rights were preserved was not undercut by the statutory amendments to the workers' compensation statute, and application of the settle around doctrine did not mean double recovery, prevent cooperation among the parties, or conflict with statutory policies. *Smith v. Chemical Leaman Tank Lines*, 285 F.3d 750 (8th Cir. 2002).

Subrogation.

A compensation carrier's subrogation extends to sums paid to the estate of a deceased employee under the uninsured motorist provision of his automobile policy and covers sums paid to dependents of the decedent as well as those paid to his estate. *Boehler v. Insurance Co. of N. Am.*,

290 F. Supp. 867 (E.D. Ark. 1968). But see *Heiss v. Aetna Casualty & Surety Co.*, 250 Ark. 474, 465 S.W.2d 699 (1971).

Under subsection (b) employer's workers' compensation insurance carrier was entitled to subrogation and was entitled to have its subrogation claim satisfied in whole or in part out of plaintiff's award. *Rhoads v. Service Machine Co.*, 329 F. Supp. 367 (E.D. Ark. 1971).

Workers' compensation carrier for employer of deceased employee who was killed within the scope of his employment when he was struck by uninsured motorist's vehicle was not entitled to subrogation against uninsured motorist benefits payable to decedent's administratrix. *Travelers Ins. Co. v. National Farmers Union Property & Cas. Co.*, 252 Ark. 624, 480 S.W.2d 585 (1972).

The provisions of subsection (b) mean that the employer or insurance carrier is given the right to file with the court a notice of its lien to protect its subrogation rights but not the right to actively participate in the employee's action against the tortfeasor. *Amos v. Stroud*, 252 Ark. 1100, 482 S.W.2d 592 (1972).

Where insurance company was carrier of workers' compensation for employer of injured employee and insurer of third-party tortfeasor, insurance company was entitled to intervene in action by employee against tortfeasor and to recover the amount paid by it on workers' compensation claim. *Burt v. Hartford Accident & Indem. Co.*, 252 Ark. 1236, 483 S.W.2d 218 (1972).

The fact that deceased's parents, before judgment in a wrongful death action, settled with one of the tortfeasors did not preclude insurance carrier from suing the tortfeasor for claims paid by it. *Maryland Cas. Co. v. Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974).

Surety subrogation rights were cut off on parents since they were neither dependents under subsection (a) nor beneficiaries under subsection (b) and had asked no medical or burial costs in settlement with tortfeasor just prior to trial. *Maryland Cas. Co. v. Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974).

Compromise settlement between plaintiff and third-party defendants must be approved by court or commission, but the burden of proof is not entirely on third-party defendants where insurance carrier

seeks right of subrogation against plaintiff's recovery. *Liberty Mut. Ins. Co. v. Billingsley*, 256 Ark. 947, 511 S.W.2d 476 (1974).

Appropriate method of calculating compensation carrier's subrogation award was to deduct from gross settlement proceeds the cost of collection, and then to deduct from remainder any payment by tortfeasor's insurer of otherwise compensable medical expenses paid as part of settlement; figure thus obtained constitutes net proceeds of settlement and subrogation award should have been two-thirds of this amount. *Washington County v. Ford*, 21 Ark. App. 206, 730 S.W.2d 515 (1987).

A workers' compensation insurance carrier could not, as subrogee of an injured employee, sue the sole owner and officer of the employer as a third person for injuries sustained by the employee in the crash of an airplane piloted by the owner/officer. *Zenith Ins. Co. v. VNE, Inc.*, 61 Ark. App. 165, 965 S.W.2d 805 (1998).

Workers' compensation insurance carrier was not entitled to a subrogation lien against the settlement proceeds generated by a settlement between the injured employee and the doctor who inflicted nerve damage on the injured employee during surgery for a work-related injury as subrogation was only allowed where the settlement made the injured employee whole and the evidence showed that the settlement did not make the injured employee whole. *Travelers Ins. Co. v. O'Hara*, 350 Ark. 6, 84 S.W.3d 419 (2002).

Utility company and its insurer could not enforce its subrogation lien rights against its employee, a lineman, who was injured on the job as the lineman was not made whole by the recovery against the third-party tortfeasor. *South Cent. Ark. Elec. Coop. v. Buck*, 354 Ark. 11, 117 S.W.3d 591 (2003).

Allowing an insurer to assert its right to a lien against the tortfeasor as well as its insured served to further the intent of this section given that the insurer was denied its statutory right to either participate in an action against the tortfeasor brought by the insured or have notice of the settlement and an opportunity to be heard; the trial court was incorrect in finding that a release signed by the insured operated to bar any claims by the insurer against the tortfeasor, and it was immaterial that the

insurer failed to give notice of its claim to the tortfeasor's insurance company. *Liberty Mut. Ins. Co. v. Whitaker*, 83 Ark. App. 412, 128 S.W.3d 473 (2003).

Federal district court's application of a Arkansas Supreme Court decision, which applied the made-whole doctrine to the statutory subrogation lien in subdivision (b)(1) of this section, was appropriate and imperative given the rule that, in diversity cases, federal courts must follow state law as announced by the highest court in the state. *Caldwell v. TACC Corp.*, 423 F.3d 784 (8th Cir. 2005).

Arkansas Workers' Compensation Commission did not err in finding that employee had not been made whole by a \$25,000 settlement from a tortfeasor in a car accident that resulted in a compensable injury based on the fact that some of the settlement reflected an award for pain and suffering and the amount of wage loss suffered; therefore, an employer and its insurer were not entitled to subrogation. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

Appellate court reversed the Arkansas Workers' Compensation Commission's decision that an employer and the workers' compensation carrier were entitled to subrogation as the damages that employee received in a third party lawsuit after his attorney fees were paid were less than the actual jury verdict; thus, the employee had not been made whole. *Yancey v. B&B Supply*, 92 Ark. App. 348, 213 S.W.3d 657 (2005).

Third Party.

The term "third party" as used in this section can only mean a person or entity other than the first and second parties involved, and the first and second parties mean the injured employee and the employer or one liable under the section. *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969).

President and owner of corporation was the employer and was not "third party" under this section so as to permit tort suit against him at common law. *Neal v. Oliver*, 246 Ark. 377, 438 S.W.2d 313 (1969).

Provisions regarding "third party liability" to an injured worker show intent of General Assembly was to preclude insurer from independent liability. *Burkett v. PPG Indus., Inc.*, 294 Ark. 50, 740 S.W.2d 621 (1987).

A working partner does not become a fellow employee, subject to third-party liability pursuant to this section, because of active involvement in the operations of the business. *Hill v. Patterson*, 313 Ark. 322, 855 S.W.2d 297 (1993).

Insurance carrier was not entitled to bring a contract action against special employer under this section because this section only provides for a carrier liable for compensation to maintain an action in tort, not contract, and then only against a third party, not an employer. *National Union Fire Ins. v. Tri-State Iron & Metal*, 323 Ark. 258, 914 S.W.2d 301 (1996).

A non-supervisory coemployee is not a "third party" within the meaning of subdivision (a)(1)(A) of this section. *Brown v. Finney*, 326 Ark. 691, 932 S.W.2d 769 (1996).

Insurer and safety consultant were not immune under the exclusive remedy provision of § 11-9-105 because they were "third parties" as defined by this section. *Wilson v. Rebsamen Ins., Inc.*, 330 Ark. 687, 957 S.W.2d 678 (1997).

Appellees were third parties under the Workers' Compensation Act and, thus, employee had a right to maintain an action against them in court despite the fact that he had already pursued a compensation claim against his employer; under subdivision (a)(1)(A) of this section, employee's pursuit of a claim for compensation against his or her employer does not effect employee's right to maintain an action in court against a third-party tortfeasor, and employee was not required to make a choice between enforcing his rights under the workers' compensation laws and his constitutional right to a jury trial against the third-party tortfeasor. *Craven v. Fulton Sanitation Serv.*, 361 Ark. 390, 206 S.W.3d 842 (2005).

There was substantial evidence to support a finding that claimant was not a special employee of the company because, although the company's work was being performed when an injury was suffered, there was no contract for hire with the company and the employer was the one controlling the details of claimant's work. *Nucor Corp. v. Rhine*, 366 Ark. 550, 237 S.W.3d 52 (2006).

Underinsured Motorist Insurance.

An action by an employee against his employer's insurance carrier for underinsured motorist benefits was not barred by this section. *Elam v. Hartford Fire Ins. Co.*, 344 Ark. 555, 42 S.W.3d 443 (2001).

Court denied summary judgment to the insurer of an employer in an employee's action for underinsured motorists benefits because the employee's settlement of the subrogation claim for less than would have been paid based on the amount paid by the tortfeasor was not an admission that the employee had been made whole and in no way waived her right to underinsured benefits or was inconsistent with her position that she had not been made whole, and there were disputed facts over whether the employee had been made whole under this section as there was no record evidence reflecting her damages. *Colwell v. Shelter Mut. Ins. Co.*, — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 16651 (E.D. Ark. Mar. 3, 2008).

Cited: Consolidated Underwriters of S.C. Ins. Co. v. Bradshaw, 136 F. Supp. 395 (W.D. Ark. 1955); Curran v. Security Ins. Co., 195 F. Supp. 562 (W.D. Ark. 1961); Ragsdale v. Watson, 201 F. Supp. 495 (W.D. Ark. 1962); McFall v. United States Tobacco Co., 246 Ark. 43, 436 S.W.2d 838 (1969); Ellington v. Hartford Steam Boiler Inspection & Ins. Co., 53 F.R.D. 280 (W.D. Ark. 1971); Holiday Inns of Am., Inc. v. Wilson, 253 Ark. 915, 489 S.W.2d 806 (1973); Midwestern Distribution, Inc. v. Paris Motor Freight Lines, 563 F. Supp. 489 (E.D. Ark. 1983); Hill v. CGR Medical Corp., 9 Ark. App. 334, 660 S.W.2d 171 (1983); Hill v. CGR Medical Corp., 282 Ark. 35, 665 S.W.2d 274 (Ark. 1984); Simmons First Nat'l Bank v. Thompson, 285 Ark. 275, 686 S.W.2d 415 (1985); Lewis v. Crowe, 296 Ark. 175, 752 S.W.2d 280 (1988); Daniels v. Cravens, 297 Ark. 388, 761 S.W.2d 942 (1988); Wilson v. Beloit Corp., 869 F.2d 1162 (8th Cir. 1989); Gullett v. Brown, 307 Ark. 385, 820 S.W.2d 457 (1991); Bushong v. Garman Co., 311 Ark. 228, 843 S.W.2d 807 (1992); Stapleton v. M.D. Limbaugh Constr. Co., 333 Ark. 381, 969 S.W.2d 648 (Ark. 1998); Northwest Ark. Area Agency on Aging v. Golmon, 70 Ark. App. 136, 15 S.W.3d 363 (2000); Phillips v. United States, 422 F.3d 709 (8th Cir. 2005).

11-9-411. Effect of payment by other insurers.

(a)(1) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

(2) The reduction specified in subdivision (a)(1) of this section does not apply to any benefit received from a group policy for disability if the injured worker has paid for the policy.

(b) The claimant shall be required to disclose in a manner to be determined by the Workers' Compensation Commission the identity, address, or phone number of any person or entity which has paid benefits described in this section in connection with any claim under this chapter.

(c)(1) Prior to any final award or approval of a joint petition, the claimant shall be required to furnish the respondent with releases of all subrogation claims for the benefits described in this section.

(2)(A) In the event that the claimant is unable to produce releases required by this section, then the commission shall determine the amount of such potential subrogation claims and shall direct the carrier or self-insured employer to hold in reserve only said sums for a period of five (5) years.

(B) If, after the expiration of five (5) years, no release or final court order is presented otherwise directing the payment of said sums, then the carrier or self-insured employer shall tender said sums to the Death and Permanent Total Disability Trust Fund.

History. Acts 1993, No. 796, § 32; 2009, No. 327, § 1.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

ANALYSIS

Construction.
Purpose.
Employer's Setoff.
Reduction of Benefits.

Construction.

Allowing the offsets pursuant to the clear language of subsection (a) did not violate § 11-9-109, stating that the claimant could not be required to pay the employer's workers' compensation premium.

Dooley v. Automated Conveyor Sys., 84 Ark. App. 412, 143 S.W.3d 585 (2004).

Purpose.

This section applies to retirement-disability benefits, as the overriding purpose of this section is to prevent a double recovery by a claimant for the same period of disability. Henson v. GE, 99 Ark. App. 129, 257 S.W.3d 908 (2007).

Employer's Setoff.

As a general rule, there is ordinarily no reduction of compensation benefits be-

cause of payments made from private pensions or health and accident insurance, whether provided by the employer, union, or the claimant himself; however, the employer may be entitled to a setoff where the employer clearly establishes that (1) the claimant has received payments from insurance provided by the employer; and (2) sums paid to the injured employee were intended as advance payments of compensation. *Riverside Furn. Co. v. Loyd*, 42 Ark. App. 1, 852 S.W.2d 147 (1993), superseded by statute as stated in, *Dooley v. Automated Conveyor Sys.*, 84 Ark. App. 412, 143 S.W.3d 585 (2004).

Only where the employer clearly establishes that sums paid to an injured employee are advance payments of compensation is the employer entitled to any setoff; in all other situations, the employee recovers the full amount of his disability benefits provided under the Workers' Compensation Act. *Riverside Furn. Co. v. Loyd*, 42 Ark. App. 1, 852 S.W.2d 147 (1993), superseded by statute as stated in, *Dooley v. Automated Conveyor Sys.*, 84 Ark. App. 412, 143 S.W.3d 585 (2004).

Appellate court affirmed a workers' compensation award that denied a school district and its insurer a credit as statutes in Arkansas are to be strictly construed and nothing in this section indicated that the school district and the insurer were entitled to a credit for the life insurance proceeds the decedent's wife received subsequent to his death. *Dollarway Sch. Dist. v. Lovelace*, 90 Ark. App. 145, 204 S.W.3d 64 (2005).

Arkansas Workers' Compensation Commission did not err under subsection (a) of this section in allowing the Arkansas Second Injury Fund to receive a dollar-for-dollar credit for disability benefits against any workers' compensation payments where the employee conceded that the employee's long-term-disability benefits fit within the definition of a group-disability policy under subsection (a) of this section. *Henson v. GE*, 99 Ark. App. 129, 257 S.W.3d 908 (2007).

When the employee's left shoulder was injured when a door-hanging mechanism fell, three co-workers witnessed the incident and it was immediately reported to his supervisor; after surgery, a doctor assessed a five-percent whole-person-impairment rating. The Arkansas Workers' Compensation Commission determined that he sustained a compensable injury under § 11-9-102(4)(D) and was entitled to temporary-total-disability benefits; the case was remanded to the Commission to determine whether the employer was entitled to an offset under subdivision (a)(1) of this section for benefits already paid. *Potlatch Corp. v. Word*, 2009 Ark. App. 772, 359 S.W.3d 426 (2009).

Workers' Compensation Commission provided no facts in support of its conclusion that the Second Injury Fund was not entitled to an offset for VA benefits received by an employee pursuant to subdivision (a)(1) of this section. Remand was required for additional findings as to whether the VA benefits were related to the period of disability covered by the Fund. *Second Injury Fund v. Osborn*, 2010 Ark. App. 120, — S.W.3d — (2010).

As the 2009 statutory amendment to subsection (a) of this section dealt with the substance of a firefighter's entitlement to retirement disability benefits, the statute was substantive and could not be applied retroactively to cover the firefighter's injury; consequently, the city was entitled to an offset against his retirement disability benefits. *Clevenger v. City of Jonesboro*, 2011 Ark. App. 579, — S.W.3d — (2011).

Reduction of Benefits.

Under the plain meaning of the language in subsection (a), it was clear that medical expenses that were paid directly to the medical provider were paid on behalf of the claimant and, thus, the workers' compensation benefits payable to the claimant were properly reduced dollar-for-dollar. *Dooley v. Automated Conveyor Sys.*, 84 Ark. App. 412, 143 S.W.3d 585 (2004).

Cited: *Ayers v. Domtar Indus.*, 2010 Ark. App. 208, — S.W.3d — (2010).

SUBCHAPTER 5 — ACCIDENTAL INJURY OR DEATH

SECTION.

- 11-9-501. Limitations on compensation — Death and disability.
- 11-9-502. Limitations on compensation — Exceptions.
- 11-9-503. Violation of safety provisions.
- 11-9-504. Additional compensation — Illegally employed minor.
- 11-9-505. Additional compensation — Rehabilitation.
- 11-9-506. Limitations on compensation — Recipients of unemployment benefits.
- 11-9-507. Special project to improve safety.
- 11-9-508. Medical services and supplies — Liability of employer.
- 11-9-509. Medical services and supplies — Amounts and time periods
- 11-9-510. Medical services and supplies — Contest of liability.
- 11-9-511. Medical services and supplies — Physical examination.
- 11-9-512. Medical services and supplies — Refusal to submit to operation.
- 11-9-513. Medical services and supplies — Approval of charges.
- 11-9-514. Medical services and supplies — Change of physician.
- 11-9-515. Medical services and supplies — Spiritual treatment.

SECTION.

- 11-9-516. Medical services and supplies — Information furnished by provider.
- 11-9-517. Medical services and supplies — Rules and regulations.
- 11-9-518. Weekly wages as basis for compensation.
- 11-9-519. Compensation for disability — Total disability.
- 11-9-520. Compensation for disability — Temporary partial disability.
- 11-9-521. Compensation for disability — Scheduled permanent injuries.
- 11-9-522. Compensation for disability — Unscheduled permanent partial disability.
- 11-9-523. Compensation for disability — Hernia.
- 11-9-524. Compensation for disability — Disfigurement.
- 11-9-525. Compensation for disability — Second injuries.
- 11-9-526. Compensation for disability — Refusal of employee to accept employment.
- 11-9-527. Compensation for death.
- 11-9-528. Employer records.
- 11-9-529. Employer reports.
- 11-9-530. Managed care implementation.

Publisher's Notes. *Ricarte v. State*, CR 86-31, referred to in Acts 1987, No. 1015, § 21, is cited as 290 Ark. 100, 717 S.W.2d 488 (1986).

Cross References. Payment to dependents of covered public employees killed in the line of duty, § 21-5-701 et seq.

Effective Dates. Acts 1961, No. 479, § 2: Mar. 16, 1961. Emergency clause provided: "It has been found and is declared by the General Assembly that inflation has rendered funeral expense benefits under the Workers' Compensation Act grossly insufficient to accomplish the purpose for which such benefits were originally intended; that there is urgent need to increase such benefits; and that enactment of this bill will provide the remedy. Therefore, an emergency is declared to

exist, and this act, being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval."

Acts 1973, No. 221, § 3: Mar. 2, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that the welfare of both employer and employee is of primary interest and concern to the State of Arkansas; that the maximum benefits presently payable under the Workers' Compensation law have become totally inadequate due to the steadily increasing cost of living, and that it is in the best interest of both employers and employees that this be accomplished as soon as possible. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate

preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 330, § 3: Mar. 7, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that immediate passage of this Act is necessary to permit employees to have full coverage of medical benefits in industrial accidents. Therefore, an emergency is hereby declared to exist and this Act, being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1227, § 21: Feb. 13, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that the welfare of both employer and employee is of primary interest and concern to the State of Arkansas; that the maximum benefits presently payable under the Workmen's Compensation law are inadequate due to the steadily increasing cost of living and should be increased immediately to meet said increase in the cost of living; that certain other provisions should be clarified or modified, and that it is in the best interest of both employers and employees that this be accomplished as soon as possible. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 253, § 12: Mar. 2, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain provisions of the Workers' Compensation law are in urgent need of revision to more clearly define the benefits to be provided by Worker's Compensation coverage; that this Act is designed to provide such clarification and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 290, § 17: Mar. 3, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is urgent need to clarify the provisions of the Arkansas Workers'

Compensation law and to provide improved benefits for persons qualifying under that Act; that this Act is designed to provide such clarification and improved benefits and should be given effect at the earliest possible date. Therefore an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1985, No. 842, § 3: April 4, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that the present law allowing only \$750 funeral expenses benefits under the Workers' Compensation Act is totally inadequate and should be increased immediately to provide more equitable protection to survivors of a person who dies from work-related injuries. Therefore, an emergency is hereby declared to exist, and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1986 (2nd Ex. Sess.), No. 10, § 15: July 1, 1986. Emergency clause provided: "It is hereby found and determined by the General Assembly that the increased benefits and improvements in the administration of the Workers' Compensation system in Arkansas is in the best interest of employees, employers, the public in general; therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1986."

Acts 1987, No. 1015, § 21: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1227 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 796, § 41: July 1, 1993. Emergency clause provided: "It is hereby

found and determined by the General Assembly that the Workers' Compensation Law is in immediate need of substantial revision; that this act accomplishes immediate revision; and that this act shall go into effect as soon as is practical which is determined to be July 1, 1993; and that unless this emergency clause is adopted, this act will not go into effect until after July 1, 1993. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1993. Furthermore, the provisions of this act shall apply only to injuries which occur after July 1, 1993."

Acts 1997, No. 260, § 7: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that unless the General Assembly acts, the impairment rating guide adopted by the Workers' Compensation Commission will become null and void on March 1, 1997; that if the guide is permitted to expire, there will be no impairment guide in effect and injured workers may be deprived of just benefits; that the purpose and intent of this act is to approve the impairment guide adopted by the commission and the act should be given effect immediately to assure that there will be no lapse in the application of the impairment rating guide. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 975, § 20: July 1, 1997. Emergency clause provided: "It is hereby found and determined by the Eighty-First General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of

this Act on July 1, 1997 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1997 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1997."

Acts 1999, No. 1179, § 19: July 1, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1999 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1999 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1999."

Acts 2003, No. 1473, § 74: July 1, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act includes technical corrects to Act 923 of 2003 which establishes the classification and compensation levels of state employees covered by the provisions of the Uniform Classification and Compensation Act; that Act 923 of 2003 will become effective on July 1, 2003; and that to avoid confusion this act must also effective on July 1, 2003. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2003."

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Injuries incurred while traveling to and from work with employer's receipts, 63 A.L.R.4th 235.

Value of home services provided by victim's relative, 65 A.L.R.4th 142.

Recovery for home services provided by spouse, 67 A.L.R.4th 765.

Reasonableness of employee's refusal of medical services tendered by employer, 72 A.L.R.4th 905.

Compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 A.L.R.4th 110.

Bonus as a factor in determining amount of compensation, 84 A.L.R.4th 1055.

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Employee's reimbursement for travel expenses incurred in obtaining treatment of work-related injury, 36 A.L.R.5th 225.

Excessiveness or adequacy of damages awarded for injury to trunk or torso, or internal injuries, 48 A.L.R.5th 129.

Head or brain injuries, excessiveness or adequacy of damages awarded, 50 A.L.R.5th 1.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damages, 52 A.L.R.5th 1.

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11-9-501. Limitations on compensation — Death and disability.

(a)(1) Compensation to the injured employee shall not be allowed for the first seven (7) days' disability resulting from injury, excluding the day of injury.

(2) If a disability extends beyond that period, compensation shall commence with the ninth day of disability.

(3) If a disability extends for a period of two (2) weeks, compensation shall be allowed beginning the first day of disability, excluding the day of injury.

(b) Compensation payable to an injured employee for disability, other than permanent partial disability as specified in subsection (d) of this section, and compensation payable to surviving dependents of a deceased employee, the total disability rate shall not exceed sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the employee's average weekly wage with a twenty dollar (\$20.00) per week minimum, subject to the following maximums:

(1) For disability or death due to an injury occurring on and after July 1, 1987, through December 31, 1988, the maximum weekly benefits payable shall be one hundred eighty-nine dollars (\$189);

(2) For disability or death due to an injury occurring on and after January 1, 1989, through December 31, 1989, the maximum weekly benefits payable shall be sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the state average weekly wage;

(3) For a disability or death which results from an injury occurring on and after January 1, 1990, the maximum weekly benefit payable shall be seventy percent (70%) of the state average weekly wage;

(4) For a disability or death which results from an injury occurring during a calendar year beginning on or after January 1, 1996, the maximum weekly benefit payable shall be eighty-five percent (85%) of the state average weekly wage if, and only if, the Insurance Commissioner certifies to the Workers' Compensation Commission during December 1995, that the overall workers' compensation insurance rates for Arkansas have decreased by at least ten percent (10%) subsequent to July 1, 1993;

(5) After January 1, 1994, the weekly benefit rate shall be rounded to the nearest whole dollar, i.e., if the actual rate be a dollar amount plus forty-nine cents (49¢) or less, the rate for compensation purposes shall be the next lower whole dollar amount, and, if the actual rate be a dollar amount plus fifty cents (50¢) or more, then the rate for compensation purposes shall be the next higher whole dollar amount.

(c)(1) Upon request of the respondent or carrier, the commission shall review the claim and determine the necessity for additional temporary total benefits after forty (40) weeks or after any thirteen-week interval thereafter and may, if warranted by the preponderance of the evidence on the basis of the record as a whole, extend the period of payment for temporary total disability.

(2) Any weekly benefit payments made after the commission has terminated temporary total benefits shall be classified as warranted by the facts in the case and as otherwise provided for in this chapter.

(d)(1) The permanent partial disability rate for compensation payable to an employee for permanent partial disability which results from an injury occurring on or after July 1, 1986, shall not exceed sixty-six and two-thirds percent (66²/₃%) of the employee's average weekly wage, with a twenty-dollar-per-week minimum, subject to a maximum of one hundred fifty-four dollars (\$154). However, if the employee's total disability rate for the injury would be two hundred five dollars and thirty-five cents (\$205.35) per week or greater, then the maximum permanent partial disability rate shall be seventy-five percent (75%) of the employee's total disability rate.

(2)(A) The permanent partial disability rate provided herein shall also apply to scheduled permanent injuries except those resulting in amputation or permanent total loss of use of a member.

(B) The permanent partial disability rate for amputation or permanent total loss of use of a member shall be the same as the employee's total disability rate as specified in subsection (b) of this section, subject to the maximum as set forth in subdivision (b)(4) of this section.

(3) The provisions of this subsection shall apply only to those injuries which occur on or after January 1, 1996.

(e) Compensation payable to the dependents of a deceased employee shall be in addition to the funeral allowance and those benefits which were paid or to which the injured employee was entitled in his or her lifetime under §§ 11-9-508 — 11-9-517 and §§ 11-9-519 — 11-9-526.

History. Init. Meas. 1948, No. 4, § 10, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 1, Acts 1957; Init. Meas. 1968, No. 1, § 1, Acts 1969; Acts 1973, No. 221, § 1; 1975 (Extended Sess., 1976), No. 1227, § 4; 1979, No. 253, § 2; 1981, No. 290, § 2; 1986 (2nd Ex. Sess.), No. 10, § 2; A.S.A. 1947, § 81-1310; reen. Acts 1987, No. 1015, § 4; Acts 1993, No. 796, § 15; Acts 1995, No. 129, § 1; 1995, No. 1144, §§ 1, 2.

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U. Ark. Little Rock L.J. Survey—Workers' Compensation, 11 U. Ark. Little Rock L.J. 269.

CASE NOTES

ANALYSIS	—In General.
Constitutionality.	—Amount.
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Disability Determination.
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Constitutionality.

Statutes limiting recovery for permanent total disability resulting from a second injury while working for the same employer, but leaving open-ended the recovery for permanent total disability from a single injury, are not unconstitutional as an unreasonable classification, since the purpose is to encourage employers to retain injured employees. *Corbitt v. Mohawk Rubber Co.*, 256 Ark. 932, 511 S.W.2d 184 (1974).

Construction.

There is no ambiguity between the language of subsection (c) of this section and § 11-9-502(b)(1). *Sparks Regional Medical Ctr. v. Death & Permanent Total Disability Bank Fund*, 22 Ark. App. 204, 737 S.W.2d 463 (1987).

Subsection (b) of this section does not except compensation payable to surviving dependents of a deceased employee from the 66⅔% limitation. *Mecco Seed Co. v. London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994).

The commission erred in holding that a dependent widow and three children could recover 80% of the deceased employee's average weekly wage, since this exceeded 66⅔% of the deceased's average weekly wage; the amounts set out in § 11-9-527 are subject to the maximum limitations as set forth in subsection (b) of this section. *Mecco Seed Co. v. London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994).

Compensation.

—In General.

Maximum compensation figure covered all benefits payable under both this section and § 11-9-521. *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969).

The term "compensation" as used in this section refers to money benefits paid to the injured employee for disability. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

The proviso of subsection (d) regarding the maximum weekly benefit for permanent partial disability is limited by the total disability rate which is defined in

subsection (b). *Noggle v. Arkansas Valley Elec. Coop.*, 31 Ark. App. 104, 788 S.W.2d 497 (1990).

—Amount.

Where the degree of permanent partial disability was of a percentage that would cause the percentage of his wages to be less than the minimum compensation, it was proper for the commission to order payment of the minimum for the total number of weeks allowed. *Hardware Mut. Cas. Co. v. Maxey*, 212 Ark. 161, 205 S.W.2d 29 (1947) (decision under prior law) *Metro Temporaries v. Boyd*, 314 Ark. 479, 863 S.W.2d 316 (Ark. 1993).

Where board awarded specific compensation for permanent injury, employee was entitled to payment of that amount even though employer had previously paid him more than the amount. *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952).

The minimum is not to be applied inflexibly in every case or demonstrable inequalities will occur, so, in no case is the amount to exceed the amount of average weekly contributions to the support of his parents by the deceased employee, even though this amount is less than the minimum. *Vines v. Arkansas Kraft Corp.*, 247 Ark. 573, 446 S.W.2d 669 (1969).

Workers' Compensation Commission had authority to reduce the amount of award for a compensable injury without resorting to expert testimony that claimant's doctor's bill was excessive in precisely that amount. *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977).

Where claimant suffered a compensable injury, received medical treatment, returned to his regular job and continued to work until he became totally disabled several years later, claimant is entitled to the maximum weekly benefit rate in effect at the time the disability occurred, and this rate is based on the wages being earned on the date of the accident. *Montgomery v. Delta Airlines*, 31 Ark. App. 203, 791 S.W.2d 716 (1990).

—Employment During Disability.

A worker who receives an award for a definite number of weeks, and during the time accepts employment and later petitions for a resumption of payments, is entitled to the payment with no deduction for "time out" during voluntary employment. *Paramount Pictures, Inc. v. Snow*,

213 Ark. 713, 212 S.W.2d 346 (1948) (decision under prior law).

—Joint Employment.

In determining benefits for a claimant who was employed by two employers in the capacity of a joint employee and who was only working one forty-hour work week, although employee was receiving a check from both employers for the same work week, the commission concluded that claimant was entitled to idemnity benefits based upon his combined wages. *Cook v. Recovery Corp.*, 50 Ark. App. 49, 900 S.W.2d 212 (1995), *aff'd*, 322 Ark. 707, 911 S.W.2d 581 (1995).

Dependents.

Widow of a deceased worker did not have priority, but shared priority with children by a prior marriage, receiving a proportionate amount of the maximum weekly benefit as set out in subsection (e). *Gary McJunkin Trucking Co. v. Byars*, 258 Ark. 387, 525 S.W.2d 662 (1975).

A widow's lump sum payment upon remarriage does not constitute a weekly benefit and thus may not be applied as a weekly death payment in calculating an employer's maximum liability. *Death & Permanent Total Disability Trust Fund v. Tyson Foods, Inc.*, 304 Ark. 359, 801 S.W.2d 653 (1991).

Disability Determination.

Evidence sufficient to support commission finding that mental disability was permanent as well as total. *Dresser Minerals v. Hunt*, 262 Ark. 280, 556 S.W.2d 138 (1977).

Loss of the use of the body as a whole involves two factors, the first is the functional or anatomical loss and that percentage is fixed by medical evidence, secondly, there is the wage-loss factor, that is, the degree to which the injury has affected claimant's ability to earn a livelihood; this second element is to be determined by the commission, based on medical evidence, age, education, experience, and other matters reasonably expected to affect the earning power. *Cohn v. Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ct. App. 1979).

Evidence insufficient to support the commission's finding that the claimant had only permanent partial disability rather than permanent total disability. *Smelser v. S.H. & J. Drilling Corp.*, 267 Ark. 996, 593 S.W.2d 61 (Ct. App. 1980).

Evidence insufficient to find that claimant was entitled to additional compensation for temporary total disability. *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980).

When determining the compensability of nontraumatically induced mental illness, which allegedly resulted from claimant's work, claimant must show more than the ordinary stress to which all workers are subjected. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989).

While comparisons to fellow employees may be of some evidentiary value in evaluating stress, the ultimate test is whether the stress constituted an abnormal working condition for that type of employment. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989).

The workers' compensation commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force, and its findings have the force and effect of a jury verdict. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Statute of Limitations.

The Statute of Limitations provided in § 11-9-702(a) does not begin to run until the true extent of the injury manifests itself and causes an incapacity to earn the wages which the employee was receiving at the time of the accident, and the wage loss continues long enough to entitle him to benefits. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983); *Hall's Cleaners v. Wortham*, 38 Ark. App. 86, 829 S.W.2d 424, *aff'd*, 311 Ark. 103, 842 S.W.2d 7 (1992).

Wage Earning Loss.

Whether or not an injured employee can be retrained is a pertinent factor for the commission to consider in determining the amount, if any, of wage earning loss since the commission can properly consider the worker's rehabilitation potential. *Smelser v. S.H. & J. Drilling Corp.*, 267 Ark. 996, 593 S.W.2d 61 (Ct. App. 1980).

Waiting Period.

This section makes no mention of reinstating the seven-day waiting period after a recurrence of disability. Since a recurrence is not a new injury but simply another period of incapacitation resulting from a previous injury, under the lan-

guage of this section the waiting period applies only to the first seven days' disability from injury. *Pinkston v. General Tire & Rubber Co.*, 30 Ark. App. 46, 782 S.W.2d 375 (1990).

When one receives a serious injury, for which he is disabled longer than the seven-day waiting period, and recovers adequately enough to return to work, but subsequently suffers a recurrence of his disability from the original compensable injury, imposing an additional waiting period would only penalize the injured employee, and would be contrary to the requirement that the workers' compensation act be liberally construed in favor of the claimant. *Pinkston v. General Tire & Rubber Co.*, 30 Ark. App. 46, 782 S.W.2d 375 (1990).

Where claimant sustained an accidental injury while at work, was off work for a period of six days, returned to work, continued having problems until her doctor advised that she be taken off work due to her initial injury and did not return to work again for three weeks because recurrence resulted in disability that extended beyond the required two-week period, claimant met her waiting period requirement and was entitled to compensation for all wage-loss disability suffered. *Hodges v. Baptist Medical Sys.*, 31 Ark. App. 200, 790 S.W.2d 922 (1990).

Cited: *Wilson & Co. v. Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968); *Garner v.*

American Can Co., 246 Ark. 746, 440 S.W.2d 210 (1969); *Lumbermen's Mut. Cas. Co. v. Howell*, 248 Ark. 1124, 455 S.W.2d 849 (1970); *Continental Ins. Co. v. Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ct. App. 1980); *Hunter Wasson Pulpwood v. Banks*, 270 Ark. 404, 605 S.W.2d 753 (Ct. App. 1980); *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Waldo v. Poetker*, 275 Ark. 216, 628 S.W.2d 329 (Ark. 1982); *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Moro, Inc. v. Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982); *Farm Air Corp. v. Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984); *Bemberg Iron Work v. Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984); *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985); *Marianna School Dist. v. Vandenburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985); *Glenn v. Farmers & Merchants Ins. Co.*, 649 F. Supp. 1447 (W.D. Ark. 1986); *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987); *Metro Temporaries v. Boyd*, 314 Ark. 479, 863 S.W.2d 316 (Ark. 1993); *Bussell v. Georgia-Pacific Corp.*, 64 Ark. App. 194, 981 S.W.2d 98 (1998). *Magnet Cove Sch. Dist. v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003); *Death & Permanent Total Disability Trust Fund v. Legacy Ins. Servs.*, 95 Ark. App. 189, 235 S.W.3d 544 (2006).

11-9-502. Limitations on compensation — Exceptions.

(a) The benefits shall be paid for a period not to exceed four hundred fifty (450) weeks of disability, except that this limitation shall not apply in cases of permanent total disability or death.

(b)(1)(A) For injuries occurring on or after March 1, 1981, but on or before December 31, 2007, the first seventy-five thousand dollars (\$75,000) of weekly benefits for death or permanent total disability shall be paid by the employer or its insurance carrier in the manner provided in this chapter.

(B) For injuries occurring on or after January 1, 2008, the employer or its insurance carrier shall pay weekly benefits for death or permanent total disability not to exceed three hundred twenty-five (325) times the maximum total disability rate established for the date of the injury under this chapter.

(2)(A) An employee or a dependent of an employee who receives a total of seventy-five thousand dollars (\$75,000) in weekly benefits for injuries sustained on or before December 31, 2007, shall be eligible to continue to draw benefits at the rates prescribed in this chapter, but

- all benefits in excess of seventy-five thousand dollars (\$75,000) shall be payable from the Death and Permanent Total Disability Trust Fund.
- (B) An employee or a dependent of an employee who receives the maximum amount specified in subdivision (b)(1)(B) of this section shall be eligible to continue to draw benefits at the rates prescribed by this chapter payable from the trust fund.
- (3) The trust fund shall consist of such funds as may be prescribed by law and shall be administered, invested, and disbursed by the Workers' Compensation Commission.
- (4) Each employer or the insurance carrier of the employer in each case of death of an employee where there are no dependents shall pay into the trust fund the sum of five hundred dollars (\$500).

History. Init. Meas. 1948, No. 4, § 10, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 1, Acts 1957; Init. Meas. 1968, No. 1, § 1, Acts 1969; Acts 1973, No. 221, § 1; 1979, No. 253, § 2; 1981, No. 290, § 2; 1986 (2nd Ex. Sess.), No. 10, § 2; A.S.A. 1947, § 81-1310; Acts 2007, No. 1599, § 1.

RESEARCH REFERENCES

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CASE NOTES

ANALYSIS

Construction.
Attorney's Fees.
Classification of Disability.
Death Benefits.
Disability Payments.
Employer's Liability.
Fund.
Healing Period.
Recurrent Injury.

Construction.

There is no ambiguity between the language of § 11-9-501(c) and subdivision (b)(1) of this section. Sparks Regional Medical Ctr. v. Death & Permanent Total Disability Bank Fund, 22 Ark. App. 204, 737 S.W.2d 463 (1987).

The General Assembly merely failed to amend former § 81-1313(f)(1) (§§ 11-9-519 to 11-9-526) to conform with this section through oversight and did not intentionally retain the employer's maximum liability at \$50,000. The legislature intended a reasonable result and one which allows a worker to receive all the benefits to which he is entitled; therefore, the

legislative intent that the employer shall pay the first \$75,000 of permanent total disability benefits is manifest and needs no further discussion. Death & Permanent Total Disability Trust Fund v. Whirlpool Corp., 39 Ark. App. 62, 837 S.W.2d 293 (1992).

Attorney's Fees.

Section 11-9-715 is not limited by the application of subsection (b) of this section; thus, award of attorney's fees on the controverted portion of the award in lump sum based upon the present value computation of claimant's compensation benefits, unlimited by subsection (b), but with appropriate credit for fees previously paid, was proper. Hot Spring County Bicentennial Park v. Walker, 271 Ark. 688, 610 S.W.2d 268 (1981).

There is no language in the statutes limiting the award of the attorney's fees to amounts for which the employer and its carrier both controvert and owe; the test is that fees are calculated on the amount controverted and awarded. Hot Spring County Bicentennial Park v. Walker, 271 Ark. 688, 610 S.W.2d 268 (1981).

Classification of Disability.

Payments of compensation characterized as current total disability by the law judge at the time of the initial award, and not appealed from by the employer, cannot now be recharacterized as permanent total disability in order to make the payments apply toward the maximum at which the death and permanent total disability trust fund assumes liability. *Safeway Stores v. McGough*, 32 Ark. App. 15, 794 S.W.2d 626 (1990).

Death Benefits.

Lump sum payments made to surviving spouses upon remarriage pursuant to § 11-9-527 were not death benefits; thus, the employer was not entitled to credit for death benefits paid. *Death & Permanent Total Disability Trust Fund v. Tyson Foods, Inc.*, 304 Ark. 359, 801 S.W.2d 653 (1991).

It is not inconsistent with the limitations on liability found in this section to require an employer or its carrier to pay a lump sum benefit to a widow, pursuant to § 11-9-527(d)(1). *Ft. Smith v. Tate*, 311 Ark. 405, 844 S.W.2d 356 (Ark. 1993).

Disability Payments.

Employer was not entitled to credit its weekly temporary total disability payments against the statutory limit of weekly benefits as that limit applied only to weekly indemnity benefits paid for permanent and total disability. *Sparks Regional Medical Ctr. v. Death & Permanent Total Disability Bank Fund*, 22 Ark. App. 204, 737 S.W.2d 463 (1987). See *J.A. Riggs Tractor Co. v. Etzkorn*, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

Insurance carrier was entitled to credit for payments made toward a twenty-nine percent permanent-anatomical-impairment rating against its \$75,000 maximum liability for permanent-total-disability benefits as the Arkansas Workers' Compensation Commission effectively adopted December 10 as the date that payments for temporary-total-disability benefits ended and permanent disability payments began; all payments made after December 10, 2002, were classified by the Commission as permanent-total-disability payments that could be applied towards the \$75,000 maximum. *Death & Permanent Total Disability Trust Fund v. Legacy Ins. Servs.*, 95 Ark. App. 189, 235 S.W.3d 544 (2006).

Employer's Liability.

The limit on an employer or carrier's liability under this section applies only to weekly benefits; the employer or carrier is still responsible for any benefits in addition to weekly compensation to which the claimant is entitled. It is therefore not inconsistent with the limitations on liability found in this section to require the employer or carrier to pay the lump sum benefit under § 11-9-527(d)(1). *City of Fort Smith v. Tate*, 38 Ark. App. 172, 832 S.W.2d 262 (1992), *aff'd*, 311 Ark. 405, 844 S.W.2d 356 (Ark. 1993).

Although the limit on an employer or its carrier's liability under this section applies only to weekly benefits, an employer or its carrier is still responsible for any benefits in addition to weekly compensation to which the claimant is entitled. *Ft. Smith v. Tate*, 311 Ark. 405, 844 S.W.2d 356 (Ark. 1993).

Because the limit on an employer's or insurance carrier's liability in subsection (b) of this section applied only to weekly benefits, they were responsible for the remarriage benefit described in § 11-9-527(d)(1), even after the \$75,000 cap was reached. *Ark. Elec. Co-Op Corp. v. Death & Permanent Total Disability Trust Fund*, 2012 Ark. App. 13, — S.W.3d — (2012).

Fund.

Subsection (b) does not require that each dependent must draw the limit in weekly funds before becoming eligible to draw from the fund. *Hill v. CGR Medical Corp.*, 282 Ark. 35, 665 S.W.2d 274 (Ark. 1984).

The provision of subsection (b) that the liability of the fund arises only after the limit of weekly benefits has been paid by the carrier and received by the dependents prevents acceleration of the date of liability for the fund because the credit for payments of compensation in advance can only be allowed in the weekly amounts as they fall due. *Hill v. CGR Medical Corp.*, 282 Ark. 35, 665 S.W.2d 274 (Ark. 1984).

Where the initial obligation of the carrier had been discharged in part by payment of weekly benefits and the balance by waiving its right as subrogee to participate in a recovery from a third-party tortfeasor in consideration for not being required to pay future weekly benefits to the widow and dependents of a deceased worker, the fund would become liable on

the date the carrier's limitation would have been discharged had there been no settlement. *Hill v. CGR Medical Corp.*, 282 Ark. 35, 665 S.W.2d 274 (Ark. 1984).

Healing Period.

Claimant's contention that further litigation was not precluded regarding his healing period held without merit where the requirements of collateral estoppel were satisfied; the determination of the end of the healing period was essential to the judgment because the issue in the prior litigation was whether the claimant was permanently and totally disabled, and a finding of permanent impairment necessarily entailed a determination of the end of the healing period. *Pine Bluff Whse. v. Berry*, 51 Ark. App. 139, 912 S.W.2d 11 (1995).

Recurrent Injury.

Additional benefits denied where claimant failed to prove that either his degree of permanent physical impairment or his degree of permanent partial disability increased as a result of his recurrence; any wage loss claimant suffered was a result of his first injury and not his recurrence.

Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

Cited: *Wilson & Co. v. Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968); *Continental Ins. Co. v. Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ct. App. 1980); *Hunter Wasson Pulpwood v. Banks*, 270 Ark. 404, 605 S.W.2d 753 (Ct. App. 1980); *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Waldo v. Poetker*, 275 Ark. 216, 628 S.W.2d 329 (Ark. 1982); *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Moro, Inc. v. Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982); *Farm Air Corp. v. Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984); *Bemberg Iron Work v. Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984); *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985); *Marianna School Dist. v. Vanderburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985); *Glenn v. Farmers & Merchants Ins. Co.*, 649 F. Supp. 1447 (W.D. Ark. 1986); *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987); *Noggle v. Arkansas Valley Elec. Coop.*, 31 Ark. App. 104, 788 S.W.2d 497 (1990); *Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

11-9-503. Violation of safety provisions.

(a)(1) Notwithstanding any other definition of extra-hazardous employer as provided by § 11-9-409(c), any employer who fails to utilize the consultative safety services available through the Department of Labor, its own insurance carrier, or a private safety consultant shall be identified as an extra-hazardous employer if it is established by a preponderance of the evidence that an injury or death is caused in substantial part by the failure of the employer to comply with any Arkansas statute or official regulation pertaining to the health or safety of employees or fails to follow safety consultant recommendations.

(2) When so notified, the employer shall comply with § 11-9-409(c)(2)-(8).

(b) Provided, if it is established by a preponderance of the evidence that the employee is injured as a result of the employee's violation of the employer's safety rules or instructions, the provisions of this section shall not apply.

History. Init. Meas. 1948, No. 4, § 10, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 1, Acts 1957; Init. Meas. 1968, No. 1, § 1, Acts 1969; Acts 1975 (Extended Sess., 1976), No. 1227, § 5; 1979, No. 253, § 2; 1981, No. 290, § 2; 1986 (2nd Ex. Sess.),

No. 10, § 2; A.S.A. 1947, § 81-1310; reen. Acts 1987, No. 1015, § 5; Acts 1993, No. 796, § 16.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 1015, § 5. Acts 1987, No. 834, provided that 1987 legisla-

tion reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Acts 2001, No. 1757, § 9, provided in

part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

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by Public for Protection of Workers. 31 A.L.R.6th 199.

U. Ark. Little Rock L.J. Survey—Workers' Compensation, 11 U. Ark. Little Rock L.J. 269.

CASE NOTES

ANALYSIS

Construction.
Attorney's Fee.
Computation.
Contributory Negligence.
Evidence.
Federal Laws.
Knowledge.
Private Right of Action.
Settlement.
Time for Filing.

Construction.

This section, being penal, is to be construed in favor of those upon whom a penalty is to be imposed. *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

Attorney's Fee.

Neither this section nor § 11-9-715 makes any provision for assessment of a separate fee based on the amount of the penalty. The attorney's fee allowable should be computed on the amount of compensation controverted and awarded, increased by the safety-violation penalty. *Prier Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988).

Computation.

Where claimant was totally disabled, but only 10% of the disability was caused by the injury suffered while working for the employer, the safety-violation penalty should be computed on the basis of the compensation due to the injury caused by the employer and not on the total compensation due the claimant. *Prier Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988).

Contributory Negligence.

An employee's contributory negligence does not prevent application of a penalty against the employer under this section. *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

The widow of an employee who died by electrocution, as a result of moving a grain auger without first lowering it to clear some high-voltage lines, had standing to bring an action against the employer for violation of safety provisions, pursuant to this section, even though the recovery went to the Second Injury Fund. *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986).

Evidence.

There was substantial evidence in workers' compensation case to support award of penalty under this section. *Holiday Inns of Am., Inc. v. Wilson*, 253 Ark. 915, 489 S.W.2d 806 (1973); *Dresser Minerals v. Hunt*, 262 Ark. 280, 556 S.W.2d 138 (1977); *Herman Young Lumber Co. v. Koon*, 30 Ark. App. 162, 785 S.W.2d 44 (1990).

Evidence sufficient to support commission's refusal to impose the penalty for violation of safety regulations. *Dillaha Fruit Co. v. La Tourrette*, 262 Ark. 434, 557 S.W.2d 397 (1977).

Before the penalty provision could be invoked it would have been necessary for claimant to have established by clear and convincing evidence that her injury was caused in substantial part by the failure of the employer to comply with an Arkansas safety statute or regulation pertaining to safety of employees. *Ryan v. NAPA*, 266 Ark. 802, 586 S.W.2d 6 (Ct. App. 1979).

Proof of a violation of § 11-2-102 requiring a safe place of employment for employees is sufficient to support a penalty pursuant to this section, even though § 11-2-102 is not part of the Workers' Compensation Law. *Georgia Pac. Corp. v. Ray*, 273 Ark. 343, 619 S.W.2d 648 (1981).

There was no safety violation where there was evidence that the appellant had written safety regulations and that employees were taught these rules in training; rules were posted near work areas; and there were regular safety meetings with employees to reinforce awareness of safety in the work place and what could be done to avoid accidents. *Reed v. Reynolds Metals*, 33 Ark. App. 89, 801 S.W.2d 661 (1991).

Benefits awarded where evidence showed a violation of the employment safety statute, § 11-2-117. *Bussell v. Georgia-Pacific Corp.*, 48 Ark. App. 131, 891 S.W.2d 75 (1995).

Where the specific cause of an industrial accident was never ascertained with any degree of certainty, the claimant failed to meet his burden of proving by clear and convincing evidence that his injuries were substantially occasioned by a safety violation. *Estes v. Cedar Chems.*, 54 Ark. App. 311, 925 S.W.2d 444 (1996).

Federal Laws.

Inasmuch as the Federal Occupational Safety and Health Act is not an "official regulation" within the meaning of this section, employer's failure to comply with regulations under that act did not entitle employees' dependents to an additional award. *Harber v. Shows*, 262 Ark. 161, 553 S.W.2d 282 (1977).

Knowledge.

Before the Workers' Compensation Commission can award an increase in benefits, knowledge must be shown on the part of the employer from which affirmative action or nonaction by the employer contrary to safety requirements may be inferred. *Roberts v. Smith Furn. & Appliance Co.*, 263 Ark. 869, 567 S.W.2d 947 (1978).

Private Right of Action.

The statute does not grant a claimant the right to bring a claim seeking to establish an employer as an extra-hazard-

ous employer. *Vittitow v. Central Maloney*, 69 Ark. App. 176, 11 S.W.3d 12 (2000).

Settlement.

Where employee alleged violation of safety code in complaint against third party, subsequent settlement of the claim against the third party by compromise in which third party specifically avoided admission of liability was not res judicata as to the employer's liability and did not excuse the employer from the provisions of this section, the section being directed only to the precautions an employer must take for the health and safety of his employees. *Holiday Inns of Am., Inc. v. Wilson*, 253 Ark. 915, 489 S.W.2d 806 (1973).

Time for Filing.

The claim for additional compensation should not be treated as so wholly distinct from other claims for additional compensation as to be exempted from the rule that a claim for additional compensation is not barred if filed while compensation is actually being paid; accordingly, claim for additional compensation filed after the original injury was not barred where compensation had been paid continuously from the beginning. *Dresser Minerals v. Hunt*, 262 Ark. 280, 556 S.W.2d 138 (1977).

Cited: *Wilson & Co. v. Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968); *Roberts v. Smith Furn. & Appliance Co.*, 263 Ark. 869, 567 S.W.2d 947 (1978); *Continental Ins. Co. v. Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ct. App. 1980); *Hunter Wasson Pulpwood v. Banks*, 270 Ark. 404, 605 S.W.2d 753 (Ct. App. 1980); *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Waldo v. Poetker*, 275 Ark. 216, 628 S.W.2d 329 (Ark. 1982); *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Moro, Inc. v. Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982); *Farm Air Corp. v. Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984); *Bemberg Iron Work v. Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984); *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985); *Marianna School Dist. v. Vanderburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985); *Glenn v. Farmers & Merchants Ins. Co.*, 649 F. Supp. 1447 (W.D. Ark. 1986); *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987).

11-9-504. Additional compensation — Illegally employed minor.

(a) Where an injury or death is sustained by a minor employed in violation of federal or state statutes pertaining to minimum ages for employment of minors, compensation or death benefits provided for by this chapter shall be doubled.

(b) However, the penalty shall not apply when the minor misrepresents his or her age, in writing, to the employer.

History. Init. Meas. 1948, No. 4, § 10, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 1, Acts 1957; Init. Meas. 1968, No. 1, § 1, Acts 1969; Acts 1975 (Extended Sess., 1976), No. 1227, § 6; 1979, No. 253, § 2; 1981, No. 290, § 2; A.S.A. 1947, § 81-1310; reen. Acts 1987, No. 1015, § 6.

CASE NOTES**Parents.**

Where parents were not dependent upon the deceased minor son, they were not entitled to double the maximum death benefits. *Rowe v. Druyvesteyn Constr. Co.*, 253 Ark. 63, 484 S.W.2d 513 (1972).

Cited: *Wilson & Co. v. Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968); *Continental Ins. Co. v. Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ct. App. 1980); *Hunter Wasson Pulpwood v. Banks*, 270 Ark. 404, 605 S.W.2d 753 (Ct. App. 1980); *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Waldo v. Poetker*, 275 Ark. 216, 628 S.W.2d 329 (Ark. 1982);

Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Moro, Inc. v. Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982); *Farm Air Corp. v. Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984); *Bemberg Iron Work v. Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984); *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985); *Marianna School Dist. v. Vanderburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985); *Glenn v. Farmers & Merchants Ins. Co.*, 649 F. Supp. 1447 (W.D. Ark. 1986); *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987).

11-9-505. Additional compensation — Rehabilitation.

(a)(1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall control.

(b)(1) In addition to benefits otherwise provided for by this chapter, an employee who is entitled to receive compensation benefits for permanent disability and who has not been offered an opportunity to return to work or reemployment assistance shall be paid reasonable expenses of travel and maintenance and other necessary costs of a program of vocational rehabilitation if the commission finds that the

program is reasonable in relation to the disability sustained by the employee.

(2) The employer's responsibility for additional payments shall not exceed seventy-two (72) weeks, regardless of the length of the program requested.

(3) The employee shall not be required to enter any program of vocational rehabilitation against his or her consent; however, no employee who waives rehabilitation or refuses to participate in or cooperate for reasonable cause with either an offered program of rehabilitation or job placement assistance shall be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by objective physical findings.

(4) A request for the program, if elected by the claimant, must be filed with the commission prior to a determination of the amount of permanent disability benefits payable to the employee.

(c) This section shall not be construed as creating an exception to the common law regarding employment at will.

(d) The purpose and intent of this section is to place an emphasis on returning the injured worker to work, while still allowing and providing for vocational rehabilitation programs when determined appropriate by the commission.

History. Init. Meas. 1948, No. 4, § 10, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 1, Acts 1957; Init. Meas. 1968, No. 1, § 1, Acts 1969; Acts 1975 (Extended Sess., 1976), No. 1227, § 7; 1979, No. 253, § 2; 1981, No. 290, § 2; A.S.A. 1947, § 81-1310; reen. Acts 1987, No. 1015, § 7; Acts 1993, No. 796, § 17.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

Ark. L. Rev. Fulkerson, Vocational Rehabilitation in the Workers' Compensation System, 33 Ark. L. Rev. 723.

Recent Developments in Tort Law (Davis v. Dillmeier Enterprises, Inc.), 51 Ark. L.Rev. 223.

CASE NOTES

ANALYSIS	Rehabilitation Evaluation.
Purpose.	Request.
Applicability.	Suspension of Other Benefits.
Appeal.	Termination of Employee.
Award of Benefits.	Purpose.
Collective Bargaining Agreements.	The plain language of subdivision (a)(1) provides benefits in addition to those workers' compensation benefits already being received by a claimant; the combination of compensation benefits and additional benefits are designed to pay the employee a total amount equal to his or her average salary, thus making the em-
Discretion.	
Duty of Employer.	
Extent of Disability.	
Lost Wages.	
Maintenance.	
Refusal to Participate.	
Refusal to Rehire Employee.	

ployee whole. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

Legislative intent and language of subdivision (a)(1) of this section does not allow an employer to implement a 90-day, light-duty policy to circumvent statutory obligations designed to extend for a year. *Allen v. Int'l Paper Co.*, 89 Ark. App. 266, 202 S.W.3d 13 (2005).

Applicability.

This section does not apply to a claimant released from treatment and consequently no longer receiving any compensation benefits for her injury. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

The filing requirement in subdivision (b)(4) does not mean that every claimant must formally file for rehabilitation with the Commission or waive entitlement to disability benefits. *Second Injury Fund v. Furman*, 60 Ark. App. 237, 961 S.W.2d 787 (1998).

The claimant was entitled to mileage costs for commuting to and from a university, notwithstanding a written rehabilitation agreement which expressly excluded such costs, since this section makes the reimbursement of reasonable travel expenses mandatory and since § 11-9-108 invalidated the parties' written agreement. *Air Compressor Equip. Co. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

Before this section can apply, an employee must prove by a preponderance of the evidence (1) that he sustained a compensable injury, (2) that suitable employment which is within his physical and mental limitations is available with the employer, (3) that the employer has refused to return him to work, and (4) that the employer's refusal to return him to work is without reasonable cause. *Roark v. Pocahontas Nursing & Rehab.*, 95 Ark. App. 176, 235 S.W.3d 527 (2006).

Appeal.

An order granting both a rehabilitation examination and benefits under subsection (d) (now (b)) ends a separable branch of the litigation and is therefore appealable. *Hampton & Crain v. Black*, 34 Ark. App. 77, 806 S.W.2d 21 (1991).

Award of Benefits.

Award of the costs of a rehabilitation program against employer held reason-

able. *Owens Country Sausage v. Crane*, 268 Ark. 732, 594 S.W.2d 872 (Ct. App. 1980).

Where a workers' compensation claimant was not entitled to permanent disability benefits following injury, he was not entitled to the costs of a vocational rehabilitation program at his employer's expense under this section. *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983).

This section does not require that permanent disability benefits be awarded a claimant before he can have vocational rehabilitation but only that he be entitled to receive compensation benefits for a permanent disability. *Hampton & Crain v. Black*, 34 Ark. App. 77, 806 S.W.2d 21 (1991).

Substantial evidence supported Workers' Compensation Commission's finding that employee met the requirements for benefits as the employee had a compensable injury, the employer did not deny that it had suitable employment within the employee's physical and mental limitations, nor did the employer deny that it refused to return the employee to work. *Congo Stove, Fireplace & Patio, Inc. v. Rickenbacker*, 77 Ark. App. 346, 74 S.W.3d 238 (2002).

Evidence supported the workers' compensation benefits awarded under this section, because the claimant returned to work immediately following his injury and continued to work for over a year before the employer fired him, and the claimant could not acquire a release to return to work since he had never been taken off work by any physician; the claimant was entitled to reasonable and necessary treatment for his ongoing back pain, and the employer had unreasonably refused to return the claimant to work when the employer had work available within his abilities. *Nestle, USA, Inc. v. Drone*, 2009 Ark. App. 311, 307 S.W.3d 54 (2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 562 (Sept. 10, 2009).

Collective Bargaining Agreements.

The requirement of subsection (a)(2) that the provisions of any collective bargaining agreement must be taken into account in determining whether suitable employment for an injured employee is available only pertains to the matter of seniority. *Needham v. Harvest Foods*, 64 Ark. App. 141, 987 S.W.2d 278 (1998).

Where the employee worked a combination driver, he sustained a compensable injury to his right foot and could no longer perform his job duties. Because the collective bargaining agreement precluded his transfer to a road driver position, the employer's refusal to return him to work was not unreasonable; therefore, the employee was not entitled to benefits under subsection (a) of this section. *Miner v. Yellow Transp., Inc.*, 2009 Ark. App. 197, 301 S.W.3d 12 (2009).

Discretion.

The commission's role requires the exercise of its discretion when approving or disapproving a rehabilitation program. Before doing so, however, the commission must first decide if the claimant is a candidate for rehabilitation. *Coosenberry v. McCroskey Sheet Metal*, 6 Ark. App. 177, 639 S.W.2d 518 (1982).

Duty of Employer.

At a minimum, subsection (a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

Extent of Disability.

Even if the claimant is not totally disabled, he may be entitled to enter a program of vocational rehabilitation under the provisions of this section. *Hampton & Crain v. Black*, 34 Ark. App. 77, 806 S.W.2d 21 (1991).

Lost Wages.

The loss of income and temporary partial disability are irrelevant to rehabilitation maintenance benefits since this section deals with the costs of rehabilitation and not with the loss of wages. *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980).

Arkansas Workers' Compensation Commission erred in awarding the claimant wage-loss benefits in excess of the claimant's anatomical impairment, because given the undisputed evidence that the claimant was contacted by the employer's vocational rehabilitation specialist but refused to speak to her until after the hear-

ing was concluded, the only reasonable conclusion to be drawn was that a rehabilitation plan existed and that the claimant manifested an unwillingness to cooperate. *Gaither Appliance v. Stewart*, 103 Ark. App. 276, 288 S.W.3d 690 (2008).

Maintenance.

Maintenance does not include the upkeep of the claimant's home during the period of rehabilitation and an amount necessary to provide for all the claimant's household and living expenses, as well as those of his family. *Gray v. Armour & Co.*, 268 Ark. 1072, 598 S.W.2d 434 (Ct. App. 1980).

Refusal to Participate.

While a worker cannot be compelled to enter a vocational rehabilitation program, there is nothing which prohibits the commission from calling to the claimant's attention his right of election where it deems this action appropriate or determines that the procedure might resolve doubtful issues. *Allen Canning Co. v. McReynolds*, 5 Ark. App. 78, 632 S.W.2d 450 (1982).

An injured worker's refusal to participate in rehabilitation cannot be treated as a bar to an assessment of wage earning loss. *Nicholas v. Hempstead County Mem. Hosp.*, 9 Ark. App. 261, 658 S.W.2d 408 (1983).

Commission may properly take a claimant's refusal to pursue rehabilitation into account in determining his degree of disability where that refusal hinders the commission's attempts to assess the extent of disability. *Second Injury Fund v. Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987).

Where the commission did not consider the claimant's failure to request rehabilitation analysis to be an impediment to its determination of permanent total disability, which it found based upon his physical injury, his age, his second-grade education, and his unskilled manual labor experience, the commission was not required to consider claimant's failure to request rehabilitation in determining the degree of his disability. *Second Injury Fund v. Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987).

Arkansas Workers' Compensation Commission erred in overturning an award of permanent partial disability benefits in

excess of permanent physical impairment where substantial evidence failed to support its determination that employee refused to participate in or cooperate with an offered program of rehabilitation and job-placement assistance. *Lohman v. SSI, Inc.*, 94 Ark. App. 424, 232 S.W.3d 487 (2006).

Where a benefits claimant refused to pursue two jobs, reported that he was unable to work the jobs, and refused to accept or read mail that came to him in connection with job-placement assistance, substantial evidence supported the denial of wage-loss benefits under § 11-9-505(b)(3). Moreover, there was no reasonable cause for his decision since his physician approved the jobs, and his financial incentive argument was rejected. *Johnson v. McKee Foods*, 98 Ark. App. 360, 255 S.W.3d 478 (2007).

Workers' Compensation Commission did not err in finding that an employer did not prove that an employee acted unreasonably in refusing to cooperate with a job-placement counselor and, thus, that subdivision (b)(3) of this section was not a bar to partial wage-loss disability because the Commission did not implement the wrong burden of proof when it was the employer's burden to establish the defense enumerated in subdivision (b)(3), and it failed in its burden; a vocational counselor identified a list of jobs, and the employee made no effort to pursue those jobs or any other employment, but the employee thought it would serve no purpose to apply for those jobs given his inability to stand for extended periods, the pain associated with his compensable injury, and the effect of his pain medication, and whether or not the employee was in fact capable of performing any of those jobs, the Commission did not find his lack of cooperation unreasonable under the circumstances. *Tucker v. Cooper Std. Auto., Inc.*, 2010 Ark. App. 7, — S.W.3d — (2010).

Refusal to Rehire Employee.

The period of "refusal" does not last only until a position is filled; the period of refusal lasts as long as the employer is doing business not to exceed the one-year limit for payment of additional benefits. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

Employer's failure to rehire claimant because a more qualified person was hired

instead was refusal to return employee to work without reasonable cause. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

Refusal to relieve employee not shown where injury was not compensable. *Needham v. Harvest Foods*, 64 Ark. App. 141, 987 S.W.2d 278 (1998).

Workers' Compensation Commission erred in denying a claimant additional compensation benefits after his employer refused to continue his light-duty work and pay after a 90-day period, based on company policy, and refused to allow him to return to work until he could resume his old job. *Allen v. Int'l Paper Co.*, 89 Ark. App. 266, 202 S.W.3d 13 (2005).

Additional findings were needed on whether an employee was entitled to benefits under subsection (a) of this section stemming from his work as a bus driver for the employer school district. The Commission was instructed to consider whether the employee's work as a bus driver was separate from, or part and parcel of, his maintenance work, which he was unable to perform; and if the bus driver work was considered separate, then whether the employee was entitled to section benefits under subsection (a). *Bryant Sch. Dist. v. Aylor*, 2011 Ark. App. 173, — S.W.3d — (2011).

Finding that the employee was not entitled to workers' compensation benefit under subdivision (a)(1) of this section was appropriate because he failed to prove that his job on the clean-up crew was suitable work and, more importantly, that the employer's refusal lacked a reasonable cause. *Contreras v. Pinnacle Foods Corp.*, 2011 Ark. App. 780, — S.W.3d — (2011).

Rehabilitation Evaluation.

Commission properly required the employer to pay for a rehabilitation evaluation. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), superseded by statute as stated in, *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984) (decided under prior law).

Employees who have sustained permanent-partial disabilities may not be viable candidates for rehabilitation and the commission is not automatically required to order an evaluation at the employer's expense merely because the employee requests it. *Coosenberry v. McCroskey Sheet*

Metal, 6 Ark. App. 177, 639 S.W.2d 518 (1982).

Evidence supported finding that claimant failed to show entitlement to a vocational rehabilitation evaluation. *Coosenberry v. McCroskey Sheet Metal*, 6 Ark. App. 177, 639 S.W.2d 518 (1982).

A claimant was entitled to reject a rehabilitation evaluation inquiry and to pursue a hearing on whether he was permanently and totally disabled. *City of Humphrey v. Woodward*, 4 Ark. App. 64, 628 S.W.2d 574 (1982).

Injured worker entitled to permanent disability benefits, even though he did not request a rehabilitation program, where neither the employer nor Second Injury Fund suggested a plan of rehabilitation and the injured worker testified about his efforts to earn his GED and his hope to be trained in the computer field. *Second Injury Fund v. Stephens*, 62 Ark. App. 255, 970 S.W.2d 331 (1998).

Request.

While this section requires that a request for rehabilitation be made prior to the determination of disability, it should be construed as only requiring the request prior to entry of a final order, a final order being one which concludes all rights of the interested parties and leaves no issues undetermined. *Allen Canning Co. v. McReynolds*, 5 Ark. App. 78, 632 S.W.2d 450 (1982).

Suspension of Other Benefits.

Where the claimant is entitled to permanent partial disability benefits, the payment must be suspended during vocational rehabilitation training, so that there should be no credit against the disability award when paying maintenance under the rehabilitation provision; thus, upon completion of the vocational rehabilitation training, it becomes the responsibility of the employer to resume and pay out the employee's permanent partial disability entitlement. *Ryan v. NAPA*, 268 Ark. 1065, 598 S.W.2d 443 (Ct. App. 1980).

Termination of Employee.

Where an employee has alleged two separate injuries, one being a work-related physical injury, for which she has received workers' compensation benefits, and one being a subsequent nonphysical injury arising from employer's action in terminating her based upon her physical

disability as a result of the injury, the first injury is exclusively cognizable under the Workers' Compensation Act (see § 11-9-105), while the subsequent injury is of the type envisioned by the Arkansas Civil rights Act, § 16-123-101 et seq. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

There is no remedy under this chapter for an employee who is terminated from his or her job on the basis of a disability after the end of the rehabilitation and compensation period; thus, the exclusive-remedy provision of this chapter does not preclude an employee from bringing an action under the Arkansas Civil Rights Act, § 16-123-101 et seq., based upon employer's alleged discrimination in terminating her on the basis of her permanent restrictions and impairments. *Davis v. Dillmeier Enters., Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

Employee was properly denied workers' compensation benefits as it was the employee's actions, by not clearing her days off with her new supervisor when she returned to light-duty work and by taking a day off without permission and not calling in to work, that caused her job to be terminated. *Roark v. Pocahontas Nursing & Rehab.*, 95 Ark. App. 176, 235 S.W.3d 527 (2006).

Sufficient evidence supported the determination by the Arkansas Workers' Compensation Commission that the employee altered the number of refills on the prescribed pain medication, justifying termination by the employer for falsifying work documents, because the nurse's testimony established the doctor's office procedure regarding the changing of a prescription, and the employer had a legitimate interest concerning when and if injured employees were being treated by physicians with the prescription of medication and the length of time the employee would be under the influence of the medication. *Ballesteros v. Tyson Poultry, Inc.*, 2009 Ark. App. 349, 308 S.W.3d 639 (2009).

Cited: *Wilson & Co. v. Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968); *Continental Ins. Co. v. Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ct. App. 1980); *Hunter Wasson Pulpwood v. Banks*, 270 Ark. 404, 605 S.W.2d 753 (Ct. App. 1980); *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Waldo v. Poetker*, 275 Ark. 216, 628 S.W.2d 329 (Ark. 1982);

Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Moro, Inc. v. Davis, 6 Ark. App. 92, 638 S.W.2d 694 (1982); Farm Air Corp. v. Reader, 11 Ark. App. 72, 666 S.W.2d 717 (1984); Bemberg Iron Work v. Martin, 12 Ark. App. 128, 671 S.W.2d 768 (1984); Calion Lumber Co. v. Goff, 14 Ark. App. 18, 684 S.W.2d 272 (1985); Marianna

School Dist. v. Vanderburg, 16 Ark. App. 271, 700 S.W.2d 381 (1985); Glenn v. Farmers & Merchants Ins. Co., 649 F. Supp. 1447 (W.D. Ark. 1986); Ashby v. Arkansas Vinegar Co., 22 Ark. App. 167, 737 S.W.2d 177 (1987); Walker Logging v. Paschal, 36 Ark. App. 247, 821 S.W.2d 786 (1992).

11-9-506. Limitations on compensation — Recipients of unemployment benefits.

(a) Any other provisions of this chapter to the contrary notwithstanding, no compensation in any amount for temporary total, temporary partial, or permanent total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment insurance benefits under the Department of Workforce Services Law, § 11-10-101 et seq., or the unemployment insurance law of any other state.

(b) Provided, however, if a claim for temporary total disability is controverted and later determined to be compensable, temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits but only to the extent that the temporary total disability otherwise payable exceeds the unemployment benefits.

History. Init. Meas. 1948, No. 4, § 10, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 1, Acts 1957; Init. Meas. 1968, No. 1, § 1, Acts 1969; Acts 1981, No. 290, § 2; A.S.A. 1947, § 81-1310; Acts 1993, No. 796, § 18.

A.C.R.C. Notes. Acts 2001, No. 1757,

§ 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

ANALYSIS

Partial Disability Benefits.
Social Security Benefits.
Unemployment Benefits.
Wages.

Partial Disability Benefits.

This section by its language is limited to temporary total disability and permanent total disability, and the receipt of temporary or permanent partial disability benefits is not precluded. *Levi Strauss & Co. v. Laymance*, 38 Ark. App. 55, 828 S.W.2d 356 (1992).

Social Security Benefits.

There is no exception for excluding compensation to persons who are eligible for or are drawing social security benefits. *Cohn v. Haile*, 267 Ark. 734, 589 S.W.2d 600 (Ct. App. 1979).

Unemployment Benefits.

Workers' compensation commission erred in determining that claimant was not entitled to temporary total disability benefits after the date he began receiving unemployment benefits because the claim fell within subsection (b) of this section; thus, the case was remanded to the com-

mission for a factual determination regarding whether claimant remained within his healing period and suffered a total incapacity to earn wages after his receipt of unemployment compensation began. *King v. Peopleworks*, 97 Ark. App. 105, 244 S.W.3d 729 (2006).

Allen Canning Co. v. Woodruff, 92 Ark. App. 237 (2005), does not stand for the proposition that a workers' compensation claimant's receipt of unemployment benefits acts as a complete bar to temporary total disability benefits when the receipt of unemployment benefits ends. *King v. Peopleworks*, 97 Ark. App. 105, 244 S.W.3d 729 (2006).

Wages.

Disability which is compensable is based upon incapacity to earn because of injury; the payment of full wages during a compensable disability does not negate the incapacity to earn but may, in proper circumstances, dispense with the requirement that compensation benefits be paid under § 11-9-807. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

Where claimant was incapacitated to earn the wages he was receiving at the time of his accident and the incapacitation continued for a long enough period to entitle him to benefits, he sustained a compensable injury within the meaning of

§ 11-9-702 and the statute of limitations began running at that time, notwithstanding that the claimant was paid full wages during period of incapacitation. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

Cited: *Wilson & Co. v. Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968); *Continental Ins. Co. v. Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ct. App. 1980); *Hunter Wasson Pulpwood v. Banks*, 270 Ark. 404, 605 S.W.2d 753 (Ct. App. 1980); *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Waldo v. Poetker*, 275 Ark. 216, 628 S.W.2d 329 (Ark. 1982); *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Moro, Inc. v. Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982); *Farm Air Corp. v. Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984); *Bemberg Iron Work v. Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984); *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985); *Marianna School Dist. v. Vanderburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985); *Glenn v. Farmers & Merchants Ins. Co.*, 649 F. Supp. 1447 (W.D. Ark. 1986); *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987); *Hampton & Crain v. Black*, 34 Ark. App. 77, 806 S.W.2d 21 (1991); *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, 212 S.W.3d 25 (2005).

11-9-507. Special project to improve safety.

(a) For the fiscal year beginning July 1, 1987, the Workers' Compensation Commission shall allocate one hundred thousand dollars (\$100,000) to a special project for the following purposes:

(1) Identification of industries or jobs having a high incidence of injuries;

(2) Determination of the causes of injuries of which there is a high incidence; and

(3) The provision of educational or advisory services to employers and employees designed to reduce the incidence of such injuries.

(b) It is the intent of this section to provide information and other services to employers and employees that will improve workplace safety in the State of Arkansas.

(c) For succeeding fiscal years, the commission shall determine to what extent the project should be funded.

History. Init. Meas. 1948, No. 4, § 10, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 1, Acts 1957; Init. Meas. 1968, No. 1,

§ 1, Acts 1969; Acts 1981, No. 290, § 2; Acts 1986 (2nd Ex. Sess.), No. 10, § 3; A.S.A. 1947, § 81-1310.

CASE NOTES

Cited: *Wilson & Co. v. Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968); *Continental Ins. Co. v. Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ct. App. 1980); *Hunter Wasson Pulpwood v. Banks*, 270 Ark. 404, 605 S.W.2d 753 (Ct. App. 1980); *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Waldo v. Poetker*, 275 Ark. 216, 628 S.W.2d 329 (Ark. 1982); *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982); *Moro, Inc. v. Davis*, 6 Ark. App. 92, 638

S.W.2d 694 (1982); *Farm Air Corp. v. Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984); *Bemberg Iron Work v. Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984); *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985); *Marianna School Dist. v. Vanderburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985); *Glenn v. Farmers & Merchants Ins. Co.*, 649 F. Supp. 1447 (W.D. Ark. 1986); *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987).

11-9-508. Medical services and supplies — Liability of employer.

(a) The employer shall promptly provide for an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee.

(b) If the employer fails to provide the medical services set out in subsection (a) of this section within a reasonable time after knowledge of the injury, the Workers' Compensation Commission may direct that the injured employee obtain the medical service at the expense of the employer, and any emergency treatment afforded the injured employee shall be at the expense of the employer. In no circumstance may an employee, his or her family, or dependents, be billed or charged for any portion of the cost of providing the benefits to which he or she is entitled under this chapter.

(c) In order to help control the cost of medical benefits, the commission, on or before July 1, 1994, following a public hearing and with the assistance and cooperation of the State Insurance Department, is authorized and directed to establish appropriate rules and regulations to establish and implement a system of managed health care for the State of Arkansas.

(d) For the purpose of establishing and implementing a system of managed health care, the commission is authorized to:

(1) Develop rules and regulations for the certification of managed care entities to provide managed care to injured workers;

(2) Develop regulations for peer review, service utilization, and resolution of medical disputes;

(3) Prohibit "balance billing" from the employee, employer, or carrier;

(4)(A) Establish fees for medical services as provided in Workers' Compensation Commission Rule 30 and its amendments.

(B) The commission shall make no distinction in approving fees from different classes of medical service providers or health care providers for provision of the same or essentially similar medical services or health care services as specified in this section; and

- (5)(A) Give the employer the right to choose the initial treating physician, with the injured employee having the right to petition the commission for a one-time only change of physician to one who is associated with a managed care entity certified by the commission or is the regular treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated by a history of regular treatment prior to the onset of the compensable injury, but only if the primary care physician agrees to refer the employee to a certified managed care entity for any specialized treatment, including physical therapy, and only if such primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by the managed care entity initially chosen by the employer.
- (B) A petition for change of physician shall be expedited by the commission.
- (e) Any section or subsection of this chapter notwithstanding, the injured employee shall have direct access to any optometric or ophthalmologic medical service provider who agrees to provide services under the rules, terms, and conditions regarding services performed by the managed care entity initially chosen by the employer for the treatment and management of eye injuries or conditions. Such optometric or ophthalmologic medical service provider shall be considered a certified provider by the commission.
- (f) The commission is authorized to promulgate any other rules or regulations as may be necessary to carry out the provisions of this section and its purpose of controlling medical costs through the establishment of a managed care system.

History. Init. Meas. 1948, No. 4, § 11, Acts 1949, p. 1420; Acts 1975, No. 330, § 1; 1979, No. 253, § 3; 1981, No. 290, § 3; 1983, No. 444, § 2; A.S.A. 1947, § 81-1311; Acts 1993, No. 796, § 19; 2003, No. 1473, § 23; 2009, No. 653, § 1.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

ALR. Workers' Compensation: Value of Expenses Reimbursed by Employer as Factor in Determining Basis for or Calculation of Amount of Compensation Under State Workers' Compensation Statute. 63 A.L.R.6th 187.

CASE NOTES

ANALYSIS	Choice of Physician.
In General.	Claims for Benefits.
Additional Benefits.	Double Recovery.
Adequate Medical Services.	Emergency Treatment.
Purpose.	Employee Liability.
Attorney's Fee.	Employer Liability.
	Failure to Provide Benefits.

Judicial Review.
 Medical Service Provider.
 Nursing Services.
 Payment by Private Carrier.
 Prosthetic Devices.
 Reasonably Necessary Treatment.
 Reimbursement.
 Subsequent Claims.

In General.

The cost of medicine and medical, surgical, or hospital services provided under this chapter is a part of "compensation" provided for by it. *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956).

The right to medical benefits is separate and distinct from the right to income benefits and medical benefits can continue even after the income benefits cease. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), superseded by statute as stated in, *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984) (decided under prior law).

Arkansas Workers' Compensation Commission erred in denying payment for expenses incurred for prescribed medications over the time period at issue as there was proof that employee's authorized physician and several successive physicians prescribed the medications to relieve pain associated with employee's compensable injury; further, there was no evidence that some of the medications were unrelated to the medical treatment employee was receiving for his work-related injury. *Hamilton v. Gregory Trucking & Houston Gen. Ins. Co.*, 90 Ark. App. 248, 205 S.W.3d 181 (2005).

Additional Benefits.

Arkansas Workers' Compensation Commission erred in finding that the claim for additional benefits was barred by the statute of limitations, because the conclusion that the entry of the agreed order resolved the request for additional benefits and effectively adjudicated the claim for additional benefits ignored the statutory language allowing for an injured employee to pursue additional benefits when the need indisputably arose within the statutory framework; the case was never dismissed pursuant to § 11-9-702(d), and the agreed order granted a continuing award of benefits which included the physician refer-

ral. *Curtis v. Big Lots*, 2009 Ark. App. 292, 307 S.W.3d 37 (2009).

Arkansas Workers' Compensation Commission did not err in denying the employee's request for additional temporary total and medical benefits under subsection (a) of this section, as substantial evidence supported the finding that the employee had received treatment for a compensable injury and his other problems were not casually related to the compensable injury. *Cole v. Commerce & Indus. Ins. Co.*, 2009 Ark. App. 617, — S.W.3d — (2009), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 27 (Jan. 7, 2010).

When the employee suffered a compensable neck injury, physical therapy was unsuccessful and two doctors recommended injection therapy as a reasonable treatment alternative. The Arkansas Workers' Compensation Commission erred by refusing to require the employer to provide additional medical care under subsection (a) of this section. *Foster v. Kann Enters.*, 2009 Ark. App. 746, 350 S.W.3d 796 (2009).

Workers' Compensation Commission decision that an employee was entitled to additional medical benefits to cover the cost of surgery was supported by substantial evidence, even though several doctors opined that spinal surgery would be to correct a congenital condition and not an injury related to a work-related incident. Because the Commission discussed the opinions of all of the doctors who evaluated the employee, it did not arbitrarily disregard any evidence; the Commission was simply confronted with opposing medical opinions and chose to accept the opinion of the physician whom the Commission found to be most credible. *SSI, Inc. v. Cates*, 2009 Ark. App. 763, 350 S.W.3d 421 (2009).

Substantial evidence supported the Workers' Compensation Commission's conclusion that a claimant's subsequent back surgery was unrelated to a compensable back injury and, therefore, not reasonably necessary treatment for that injury where the claimant had a pre-existing back injury and the claimant's surgeon never attributed the need for surgery to the compensable injury. *Parker v. Stant Mfg.*, 2009 Ark. App. 812, — S.W.3d — (2009).

Substantial evidence supported an award of additional medical benefits un-

der subsection (a) of this section where one of the claimant's doctors was of the opinion that the claimant needed ongoing medical treatment in the form of pain management and two doctors testified that the claimant should continue treatment of psychological disorders associated with reflex sympathetic dystrophy. *Evans v. Bemis Co.*, 2010 Ark. App. 65, — S.W.3d — (2010).

In a case in which a workers' compensation claimant appealed a Workers' Compensation Commission's (Commission) denial of her request for additional medical benefits in the form of medication for pain management, an administrative law judge (ALJ) and the Commission determined that the compensable injury, limited in the present case to an ice-bucket lifting incident, did not cause the need for pain management two years later. There was evidence upon which the ALJ could find that the March 16, 2005 injury had resolved by the end of March 2005. *Gilbert v. Sonic Drive-in*, 2010 Ark. App. 273, — S.W.3d — (2010).

Decision of the Arkansas Workers' Compensation Commission to deny an employee any further medical treatment was supported by substantial evidence even though the court of appeals could have reached a different result because although the medical testimony conflicted, resolving the conflicting medical evidence, making credibility determinations, and deciding what weight to give particular pieces of evidence was within the Commission's province; the Commission's opinion was very detailed and thorough, and it went over the medical records and opinions of the many doctors who treated and evaluated the employee. *Adams v. Bemis Co.*, 2010 Ark. App. 859, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 35 (Jan. 19, 2011).

Substantial evidence supported the Arkansas Workers' Compensation Commission's award of additional medical benefits to a claimant as the evidence supported a finding that neurostimulation was a reasonable and necessary medical expense under subsection (a) of this section related to the claimant's compensable neck injury. *LVL, Inc. v. Ragsdale*, 2011 Ark. App. 144, — S.W.3d — (2011).

Arkansas Workers' Compensation Commission did not err in denying an employ-

ee's claim for additional benefits in the form of pain management because evidence supporting the Commission's finding that a neurosurgeon did not recommend additional treatment was the neurosurgeon's final release to work, no recommended follow-up care, and the contradiction between the medical records and the employee's testimony that his doctors recently treated his pain with prescriptions. *Santillan v. Tyson Sales & Distrib.*, 2011 Ark. App. 634, — S.W.3d — (2011).

Arkansas Workers' Compensation Commission did not err in awarding an employee additional benefits because substantial evidence supported its finding that additional medical treatment was reasonably necessary and that the employee remained within his healing period and unable to earn wages; the employer failed to give the employee the change-of-physician form after his injury, and thus, the employee was not required to petition the Commission in order to be treated by a competent doctor. *St. Joseph's Mercy Med. Ctr. v. Redmond*, 2012 Ark. App. 7, — S.W.3d — (2012).

Where appellee employee sustained an injury when a forklift struck him in his hip and back, substantial evidence supported the award of additional medical treatment under subsection (a) of this section for an MRI of his lumbar spine, pain management and medication, and psychological treatment of his anxiety and depression. His doctor's reports contained findings of emotional problems caused by the injury and recommended additional treatment for pain management; there was no contradicting doctor's opinion. *Tyson Chicken, Inc. v. Witherspoon*, 2012 Ark. App. 99, — S.W.3d — (2012).

Workers' Compensation Commission properly denied appellant's claim for additional medical benefits. Reasonable persons could conclude that appellant, who sustained a compensable medial meniscus tear in his left knee, failed to prove that the requested medical treatment was reasonably necessary in connection with his compensable injury. *Castaneda v. Lexicon, Inc.*, 2012 Ark. App. 103, — S.W.3d — (2012).

Adequate Medical Services.

Finding in favor of the employee in a workers' compensation action was proper

where the employee exercised her absolute, statutory right to a one-time change of physician pursuant to § 11-9-514(a)(3)(A)(ii); thus, the employer and carrier were required to pay for the initial visit to the new physician in order to fulfill their obligation to provide adequate medical services under the provisions of this section. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003).

Purpose.

Primary duty to provide medical and hospital care is upon the employer, not the insurance carrier; the basic legislative purpose is to furnish the services to the injured workman, not to enrich him by monetary payment for a loss not actually suffered. *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961).

Attorney's Fee.

Where a judgment is obtained in a workers' compensation case against an employer and his insurer requiring payment for future medical services, the commission can require the employer and his insurer to report the amounts expended so as to determine attorney's fee. *Ragon v. Great Am. Indem. Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954).

Doctor, who was represented by his counsel was entitled to an attorney's fee in a sum determined by the Workers' Compensation Commission, inasmuch as a fee would have been recoverable if the doctor's claim had been represented by claimant's attorney. *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977).

Choice of Physician.

Section 11-9-514 is silent as to whether the employer or employee has the right to make the choice of an initial treating physician; this section implies that the employer has the right of first choice because the employer has a duty to provide medical services to an injured employee, but this section speaks only to the employer's duty to provide medical services or bear the expense of medical services, not to the method of providing medical treatment. *Welch v. Tri-County Shirt Co.*, 49 Ark. App. 112, 897 S.W.2d 575 (1995).

Section 11-9-514(a)(3)(A)(ii) established an absolute, statutory right to a one-time change of physician under the Arkansas Workers' Compensation Act where the

employer had contracted with a managed care organization and had exercised the right to select the initial primary-care physician; thus, employer's denial of the one-time change of physician as a matter of law failed to fulfill the obligation imposed by this section. *Collins v. Lennox Indus., Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002).

Claims for Benefits.

Neither § 11-9-108 nor this section authorizes the medical provider to initiate a claim on behalf of an employee in the event a worker elects not to file a claim for benefits. *Sloat Chiropractic Clinic v. Dat-sun*, 17 Ark. App. 161, 706 S.W.2d 181 (1986).

Double Recovery.

Where employee, who was employed by an out-of-state employer and an Arkansas employer, recovered from out-of-state employer, he cannot recover from Arkansas employer for the expenses as that would be an unjust enrichment. *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961).

Emergency Treatment.

Commission was entitled to direct immediate payment by employer of emergency treatment required by employee where primary question of compensation had been decided in favor of claimant. *Great Am. Indem. Co. v. Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953).

Employee Liability.

A medical provider whose charges are disallowed by the Arkansas Workers' Compensation Commission as unreasonable or unnecessary may recover from the employee. *Taggart v. Northeast Ark. Rehabilitation Hosp.*, 316 Ark. 39, 870 S.W.2d 717 (1994).

Employer Liability.

Where claimant overrode insurer's warning that proposed operation would be at his own expense, he acted at his peril; if the operation had disclosed a problem for which conservative treatment was indicated, as claimed by insurer's physicians, the surgical expense would not have been the employer's responsibility. *Caldwell v. Joseph W. Vestal & Son*, 237 Ark. 142, 371 S.W.2d 836 (1963).

Where worker was prescribed medications for a compensable back injury and

the evidence showed her ulcerated stomach to result from the medications, employer was liable for her hospital bill. *Warwick Elecs., Inc. v. Devazier*, 253 Ark. 1100, 490 S.W.2d 792 (1973).

Commission should have determined the portion of the rental cost of facility for paraplegic attributable to services and apparatus for which the employer was liable under this section, and the portion of the rent attributable to services for which the employer was not liable. *Pine Bluff Parks & Recreation v. Porter*, 6 Ark. App. 154, 639 S.W.2d 363 (1982).

Failure to Provide Benefits.

When an employer contends that he acted in reliance upon responsible medical opinion in refusing or terminating benefits, penalties are not ordinarily imposed. *Hamrick v. Colson Co.*, 271 Ark. 740, 610 S.W.2d 281 (1981).

Judicial Review.

The court of appeals may reverse the commission's decision only when it is convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the commission. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987).

In determining the sufficiency of the evidence to sustain the findings of the workers' compensation commission, the court of appeals reviews the evidence in the light most favorable to the commission's findings, and must affirm if there is any substantial evidence to support them. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987).

Substantial evidence supported the Arkansas Workers' Compensation Commission's decision that a claimant was not entitled to additional medical treatment under subsection (a) of this section because the claimant's medical records indicated her complaints were inconsistent with and in excess of the clinical, objective findings and there was credible testimony the claimant was malingering; thus, the claimant failed to prove that additional medical treatment was reasonably necessary, in accordance with § 11-9-705(a)(3). *Briseno v. George's, Inc.*, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 544 (Sept. 7, 2011).

Medical Service Provider.

Employee would be permitted treatment by out-of-state physician, where it

would violate the employer's statutory duty to provide medical care if that care was denied simply because there was no medical service provider in Arkansas qualified and willing to provide the service. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997), *supp. op.*, *Clark v. Director, Empl. Sec. Dep't*, 58 Ark. App. 1, 944 S.W.2d 862.

Nursing Services.

Payment for nursing services ordered paid to relative of injured person. *Sisk v. Philpot*, 244 Ark. 79, 423 S.W.2d 871 (1968); *Dresser Minerals v. Hunt*, 262 Ark. 280, 556 S.W.2d 138 (1977).

Where the claimant did not prove by a preponderance of the evidence that a nursing services award should begin on any certain date, the commission's decision to fix the beginning date on the day on which the claim was first filed was supported by the evidence. *Dresser Minerals v. Hunt*, 262 Ark. 280, 556 S.W.2d 138 (1977).

Nursing services, in the context of this chapter, embrace more than a wife's ordinary care for her sick husband. *Dresser Minerals v. Hunt*, 262 Ark. 280, 556 S.W.2d 138 (1977).

Nursing services do not include assistance with household and personal tasks which the claimant is unable to perform. *Pickens-Bond Constr. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979); *Pine Bluff Parks & Recreation v. Porter*, 6 Ark. App. 154, 639 S.W.2d 363 (1982).

The nursing services for which the employer is responsible are those reasonably necessary for the treatment of the injury; this does not include those services which one spouse is normally expected to render to another. *Pickens-Bond Constr. Co. v. Case*, 266 Ark. 323, 584 S.W.2d 21 (1979).

Finding that the employer and insurer were not liable for the employee's long-term-care expenses at a facility was appropriate pursuant to subsection (a) of this section because the employee failed to prove that residential placement at the facility qualified as compensable nursing care. Further, even assuming that the therapies offered at the facility were in the realm of nursing services and not simply "cues," the facility's administration declined to carve out the costs of such therapies from other nonnursing services. *Pack v. Little Rock Convention & Visitors*

Bureau, 2011 Ark. App. 755, — S.W.3d — (2011).

Payment by Private Carrier.

An employer is not entitled to an offset for medical expenses paid by a claimant's private insurance carrier. *Owen Drilling Co. v. Allison*, 33 Ark. App. 60, 800 S.W.2d 728 (1990).

Prosthetic Devices.

There was substantial evidence to support the finding that a myoelectric prosthesis, rather than a conventional prosthesis, was reasonably necessary to restore the claimant as far as practicable to his physical condition before his work-related injury, notwithstanding the large increase in cost, where the claimant's surgeon stated that the claimant "would be best fitted with a neuro electric device, as it is more functional, and this gentleman will require the dexterity of this device," that "this myoelectric device will be best suited for his future needs," and that not allowing him the myoelectric prosthesis was "totally unacceptable." *Air Compressor Equip. Co. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000).

Arkansas Workers' Compensation Commission's conclusion that the cosmetic prosthesis that a benefits claimant desired was not a reasonable and necessary medical treatment, pursuant to subsection (a) of this section, was supported by substantial evidence because the prosthesis would reduce the claimant's level of function due to its lack of a functional thumb or hand attachment. *Shaver v. Land O' Frost*, 2010 Ark. App. 117, — S.W.3d — (2010), rehearing denied, *Shaver v. O' Frost*, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 267 (Mar. 17, 2010), review denied, *Shaver v. O' Frost*, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 351 (June 17, 2010).

Reasonably Necessary Treatment.

The commission's factual determination that a medical procedure was reasonably necessary for treatment of injured worker was supported by sufficient evidence. *Meadors Lumber Co. v. Wysong*, 262 Ark. 425, 557 S.W.2d 395 (1977); *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984).

It is the obligation of the employer to provide medical services reasonably necessary for the treatment of the injury

received by the employee, however, the law does not require the employer to pay for medical expenses for the treatment of a preexisting disease not aggravated by the injury except to the extent it may be necessary to accomplish treatment of the injury. *Artex Hydrophonics, Inc. v. Pippin*, 267 Ark. 1014, 593 S.W.2d 473 (Ct. App. 1980).

Claimant's estate was entitled to disability and medical benefits where work-related injury traumatized preexisting condition which caused claimant to become disabled. *Little v. Delta Rice Mill, Inc.*, 11 Ark. App. 114, 667 S.W.2d 373 (1986).

What constitutes reasonable and necessary treatment under this section is a fact question for the commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

Whether the medical treatment actually provided is reasonable and necessary is a question of fact for the commission. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987).

"Compensation" includes the furnishing of medicine only to the extent that it is "reasonably necessary" for treatment of the compensable injury. *Northwest Tire Serv. v. Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988).

What constitutes reasonable and necessary treatment under this section is a fact question for the commission. *Arkansas Dep't of Cor. v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

Where employee of Arkansas Department of Correction was bitten by an inmate known to be HIV positive, the medical treatment prescribed for the purposes of detecting and/or preventing tetanus, HIV, and hepatitis was reasonably necessary for the treatment of the injury. *Arkansas Dep't of Cor. v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

The answer to the issue of what constitutes reasonable and necessary treatment under this section naturally turns on the sufficiency of the evidence. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996).

Where the treating neurosurgeon prescribed a functional capacity assessment that was not done because employer would not pay for it, and a final evaluation by the neurosurgeon was never made, the Commission erred in holding that addi-

tional medical treatment was not reasonably necessary and that the healing period had ended. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996).

Claimant's follow-up medical care was "reasonably necessary" for treatment of her compensable injury. *Georgia-Pacific Corp. v. Dickens*, 58 Ark. App. 266, 950 S.W.2d 463 (1997).

Where there was evidence that physician was a qualified specialist in whom employee had confidence and that his recommendations greatly improved employee's worsening condition, his services were reasonably necessary. *American Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998).

A physician's notes constituted substantial evidence that continued treatment of an employee for a cervical spine strain sustained at work was reasonable and necessary, notwithstanding the physician's testimony that the injury involved some degenerative changes in the employee's cervical spine. *GE Railcar Repair Servs. Workers' Comp. v. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998).

Where no postsurgical improvement took place and the Workers' Compensation Commission gave little weight to the claimant's surgeon's opinion, the commission did not err in finding that the claimant's surgical treatment was not reasonable and necessary in relation to her compensable injury. *Cox v. Klipsch & Assocs.*, 71 Ark. App. 433, 30 S.W.3d 764 (2000).

Workers' compensation commission erred in finding that a laminectomy was not reasonable and necessary treatment, as it ignored evidence that the worker's symptoms significantly improved after this surgery. *Hill v. Baptist Med. Ctr.*, 74 Ark. App. 250, 57 S.W.3d 735 (2001).

There was no evidence in the record that former employee did not suffer from coccydynia or coccygeal pain, that her pain condition stemmed from anything other than the compensable injury she sustained while working for her former employer, or that her condition did not warrant further treatment; thus, the Workers' Compensation Commission erred when it denied the employee continued medical treatment for a chronic-pain condition resulting from her work-related-injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004).

Court overturned an order from the Arkansas Workers' Compensation Commission holding that employee failed to prove her cervical surgery was reasonably necessary under subsection (a) of this section because the Commission's opinion did not address the surgical report or the post-surgical diagnosis; the reports might have contained evidence linking employee's injuries to a robbery in which she was choked and dragged. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2005).

In a workers' compensation case, employee sustained a compensable injury when ceramic glaze splashed into his eye during an art class and the medical treatment he received was reasonably necessary to treat the chemical exposure. *Fayetteville Sch. Dist. v. Kunzelman*, 93 Ark. App. 160, 217 S.W.3d 149 (2005).

Employee was examined by various physicians, none of whom recommended any future treatment options other than physical therapy, and although the physicians initially recommended physical therapy for the employee, she refused to participate in the recommended therapy because she found it too painful; thus, substantial evidence supported the Arkansas Workers' Compensation Commission's decision that the employee was not entitled to additional medical treatment. *Jones v. Wal-Mart Stores*, 100 Ark. App. 17, 262 S.W.3d 630 (2007).

Arkansas Workers' Compensation Commission erred in determining that additional medical treatment, including but not limited to a neurologist's recommendations, was not necessary under subsection (a) of this section where it relied heavily on the opinion of the poison control center director, that opinion was based upon inaccurate assumptions and speculation surrounding the employee's exposure to chemicals through an air conditioning unit, the director's opinion assumed that the employee did not suffer from symptoms that normally accompanied chemical inhalation, but the medical reports revealed that she had in fact suffered from such symptoms, and the MRI the neurologist had recommended to compare with the SPECT scan results was not done because the insurer refused to pay for it. *Bohannon v. WalMart Stores, Inc.*, 102 Ark. App. 37, 279 S.W.3d 502 (2008).

Where an employee sustained a compensable heart injury by inhaling toxic smoke, substantial evidence supported the Arkansas Workers' Compensation Commission's finding that a heart/lung transplant constituted reasonably necessary treatment for the employee's compensable heart injury because there was evidence that the employee had to undergo a lung transplant as well as a heart transplant to stabilize or maintain the compensable heart condition. *Martin Charcoal, Inc. v. Britt*, 102 Ark. App. 252, 284 S.W.3d 91 (2008).

Appellate court affirmed an award of additional medical benefits based on the injuries a claimant sustained when the bucket of the front-end loader he was driving unexpectedly dropped, causing his face to hit the steering wheel and dashboard. The Arkansas Workers' Compensation Commission found the opinion of an ear, nose, and throat specialist that the claimant's facial injuries were caused by the accident was credible and the treatment that the specialist provided was reasonably necessary in connection with the claimant's compensable injury under subsection (a) of this section; substantial evidence supported these findings. *Owens Planting Co. v. Graham*, 102 Ark. App. 299, 284 S.W.3d 537 (2008).

Finding against the employee in a workers' compensation action was inappropriate pursuant to subsection (a) of this section because it was erroneous to have found that the employee failed to seek reasonably necessary medical treatment when she sought periodic examinations to determine whether a medically foreseeable condition related to her compensable injury was advancing. A doctor had consistently recommended that the employee be periodically evaluated to allow for proper monitoring of her condition and periodic evaluations of a medically foreseeable condition related to a compensable injury constituted reasonably necessary medical treatment. *Huckabee v. Wal-Mart, Inc.*, 104 Ark. App. 22, 289 S.W.3d 107 (2008).

Where the employee's former doctors pronounced his maximum medical improvement from a back injury and assigned a five-percent impairment rating, the employee failed to show that an EMG diagnostic study recommended by a new doctor was reasonably necessary in con-

nection with his compensable injury for purposes of subsection (a) of this section. The Arkansas Workers' Compensation Commission had a substantial basis for denying payment. *Goyne v. Crabtree Contr. Co.*, 2009 Ark. App. 200, 301 S.W.3d 16 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 874 (Apr. 22, 2009).

Workers' compensation claimant failed to prove by a preponderance of the evidence that the claimant was entitled to additional medical treatment in the form of surgery recommended by a different doctor after the claimant's doctor opined that the claimant had reached maximum medical improvement and would not benefit from surgery. *Crawford v. Superior Indus. & Crockett Adjustment, Inc.*, 2009 Ark. App. 738, — S.W.3d — (2009).

Arkansas Workers' Compensation Commission's award of additional medical treatment to an employee was affirmed because, pursuant to subsection (a) of this section, the opinion of a second doctor regarding findings on employee's MRI was substantial evidence to establish that the requested medical treatment was reasonably necessary. *Staffmark v. King*, 2009 Ark. App. 830, — S.W.3d — (2009).

Arkansas Workers' Compensation Commission's finding that the employee satisfied her burden of proving that her psychiatric treatment was reasonably necessary in connection with her work-related injury was supported by substantial evidence; it was essentially undisputed that the employee suffered from significant pain and a doctor opined that pain made depression worse and depression made pain worse, creating a merry-go-round of stress-related medical problems. Moreover, the doctor also reported that the employee's psychiatric impairment was raised from a class-two level to a class-three level as a result of her compensable injury. *Dillard's, Inc. v. Johnson*, 2010 Ark. App. 138, — S.W.3d — (2010).

Substantial basis existed for the Arkansas Workers' Compensation Commission's decision that additional diagnostic testing was not reasonably necessary for the treatment of a claimant's compensable injuries; she was released to full duty and reported no continuing problems for four years until her new treating physician recommended additional diagnostic test-

ing. *Chanslor v. Sonic Drive-In*, 2010 Ark. App. 557, — S.W.3d — (2010).

Substantial evidence supported a finding by the Arkansas Workers' Compensation Commission that a second surgery on an employee's left knee was reasonable, necessary, and related to the employee's compensable injury, in accordance with subsection (a) of this section, because the first surgery was unsuccessful and the employee never had left-knee problems prior to suffering the compensable injury. *Richardson Waste, Inc. v. Corcoran*, 2010 Ark. App. 817, — S.W.3d — (2010).

Workers' compensation claimant's psychiatric treatment was reasonably necessary and causally related to the claimant's compensable back injury, as substantial evidence showed that the claimant's chronic pain exacerbated the claimant's depression; thus, a finding that the employer was liable for such treatment under this section was proper. *Aegon Ins. United States v. Durham-Gilpatrick*, 2010 Ark. App. 827, — S.W.3d — (2010).

Claimant failed to prove that additional medical treatment for his right shoulder was reasonable and necessary as evidence showed ongoing problems were due to degenerative joint disease, and not his job-related injury. *Lankford v. Crossland Constr. Co.*, 2011 Ark. App. 416, — S.W.3d — (2011).

Finding that an employee in a workers' compensation action was not entitled to medical treatment from a doctor in connection with the employee's compensable back injury was appropriate under subsection (a) of this section and § 11-9-705(a)(3) because the doctor's statement that the injuries "could" have been caused by her accident at work was insufficient under § 11-9-102(16)(B). *Hawley v. First Sec. Bancorp*, 2011 Ark. App. 538, — S.W.3d — (2011).

Employee was not entitled to additional medical treatment because, after testing and treatment, the consensus of the medical experts was that her back was essentially normal, and no surgical treatment was necessary. Any additional medical treatment the employee needed was more likely related to her preexisting scoliosis or her prior motor-vehicle accident. *Harris v. Weyerhaeuser Co.*, 2011 Ark. App. 672, — S.W.3d — (2011).

Workers' Compensation Commission's conclusion that further medical treatment

for an employee's hernia injury was not reasonably necessary under subsection (a) of this section was supported by substantial evidence because diagnostic testing had ruled out a recurrent hernia, nerve damage, or inflammation, and two physicians did not consider the employee to be a surgical candidate. *Clement v. Johnson's Warehouse Showroom, Inc.*, 2012 Ark. App. 17, — S.W.3d — (2012).

In a worker's compensation case, there was no error in finding that a surgical procedure was a reasonable and necessary treatment for the thoracic spine. Even though an employer contended that it was a risky procedure, the weight and probative value given to medical opinions was a function left to the Arkansas Workers' Compensation Commission. *Walgreen Co. v. Goode*, 2012 Ark. App. 196, — S.W.3d — (2012).

Reimbursement.

Employee held justified in seeking medical assistance on his own initiative and entitled to reimbursement. *Potlatch Forests, Inc. v. Funk*, 239 Ark. 330, 389 S.W.2d 237 (1965).

Subsequent Claims.

Lump-sum settlements under § 11-9-804 for the full amounts payable for permanent total disability did not preclude future claims for additional medical benefits accruing subsequent to the lump-sum award. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Opinion evidence which rejected a causal relationship between the growth on claimant's leg and a chemical burn on the same location, presented by two expert witness physicians, neither of whom treated or examined claimant, held substantial evidence supporting denial of the claim for additional medical benefits. *Hanson v. Amfuehl*, 54 Ark. App. 370, 925 S.W.2d 166 (1996).

Employee's claim for additional medical benefits under this section resulted from a prior injury at a prior employer; the employee's doctor predicted that the employee would have flare-ups, and his office notes characterized the employee's ongoing problems as a recurrence, rather than a new injury or an aggravation. *Bryant Sch. Dist. v. Aylor*, 2011 Ark. App. 173, — S.W.3d — (2011).

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969); *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App.

1980); *Franklin County Rd. Dep't v. Nor-din*, 270 Ark. 177, 603 S.W.2d 477 (1980); *Hamrick v. Colson Co.*, 271 Ark. 740, 610 S.W.2d 281 (1981); *Markham v. K-Mart Corp.*, 4 Ark. App. 310, 630 S.W.2d 550 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Artex Hydro-phonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983); *Savage v. General Indus.*, 23 Ark. App. 188, 745 S.W.2d 644 (1988); *County Mkt. v. Thornton*, 27 Ark. App. 235, 770 S.W.2d 156 (1989); *Nash-ville Livestock Comm'n v. Cox*, 302 Ark. 69, 787 S.W.2d 664 (1990); *TEC v. Falkner*, 38 Ark. App. 13, 827 S.W.2d 661 (1992); *Johnson v. Triple T Foods*, 55 Ark. App. 83, 929 S.W.2d 730 (1996); *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999); *GEO Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000); *Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004); *Vite v. Vite*, 2010 Ark. App. 565, — S.W.3d — (2010).

11-9-509. Medical services and supplies — Amounts and time periods.

The amounts payable or time periods allowable for authorized medical, hospital, and other services and treatment furnished under §§ 11-9-508 — 11-9-516, unless waived by the employer-respondent or approved by the Workers' Compensation Commission and warranted by the preponderance of the evidence on the basis of the record as a whole, are:

(1) Six (6) months if the claimant lost no compensable time from work as a result of his or her injury;

(2) Six (6) months following the return to work by an injured employee who has been receiving authorized medical or hospital or other services or treatment;

(3) Ten thousand dollars (\$10,000) aggregate for all authorized medical, hospital, and other services and treatment, including any amounts paid under subdivisions (1) and (2) of this section.

History. Init. Meas. 1948, No. 4, § 11, § 3; 1983, No. 444, § 2; A.S.A. 1947, § 81-Acts 1949, p. 1420; Acts 1981, No. 290, 1311.

CASE NOTES

ANALYSIS

Reasonably Necessary Treatment.
Voluntarily Furnishing Services.

Reasonably Necessary Treatment.

"Compensation" includes the furnishing of medicine only to the extent that it is "reasonably necessary" for treatment of the compensable injury. *Northwest Tire Serv. v. Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988).

Voluntarily Furnishing Services.

The voluntary furnishing of medical services to employee after the six months' period provided by this section constituted a waiver of the requirement of a commission order for the services. *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956).

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v.*

Duran, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969); *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980); *Franklin County Rd. Dep't v. Nordin*, 270 Ark. 177, 603 S.W.2d 477 (1980); *Hamrick v. Colson Co.*, 271 Ark. 740, 610 S.W.2d 281 (1981); *Markham v. K-Mart Corp.*, 4 Ark. App. 310, 630 S.W.2d 550 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983); *Eureka Log Homes v. Mantonya*, 28 Ark. App. 180, 772 S.W.2d 365 (1989).

11-9-510. Medical services and supplies — Contest of liability.

The employer shall not be liable for any of the payments provided for in §§ 11-9-508 — 11-9-516 in the case of a contest of liability where the Workers' Compensation Commission shall decide that the injury does not come within the provisions of this chapter.

History. Init. Meas. 1948, No. 4, § 11, 290, § 3; 1983, No. 444, § 2; A.S.A. 1947, Acts 1949, p. 1420; Acts 1975, No. 330, § 81-1311.
§ 1; 1979, No. 253, § 3; Acts 1981, No.

CASE NOTES

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246

Ark. 746, 440 S.W.2d 210 (1969); *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct.

App. 1980); Frank J. Rooney, Inc. v. Pitts, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); Wise v. Deltic Farm & Timber Co., 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980); Franklin County Rd. Dep't v. Nordin, 270 Ark. 177, 603 S.W.2d 477 (1980); Hamrick v. Colson Co., 271 Ark. 740, 610 S.W.2d 281 (1981); Markham v. K-Mart

Corp., 4 Ark. App. 310, 630 S.W.2d 550 (1982); Vann v. Dow Chem. Co., 561 F. Supp. 141 (W.D. Ark. 1983); Artex Hydrophonics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983); Tibbs v. Dixie Bearings, Inc., 9 Ark. App. 150, 654 S.W.2d 588 (1983).

11-9-511. Medical services and supplies — Physical examination.

(a) An injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified physician, designated or approved by the Workers' Compensation Commission, as the commission may require from time to time if reasonable and necessary.

(b) The places of examination and treatment shall be reasonably convenient for the employee.

(c) Such physician as the employee, employer, or insurance carrier may select and pay for may participate in the examination if the employee, employer, or insurance carrier so requests.

(d) In cases where the commission directs examination or treatment, proceedings shall be suspended, and no compensation shall be payable for any period during which the employee refuses to submit to examination and treatment or otherwise obstructs the examination or treatment.

(e) Failure of the employee to obey the order of the commission in respect to examination or treatment for a period of one (1) year from the date of suspension of compensation shall bar the right of the claimant to further compensation in respect to the injury.

History. Init. Meas. 1948, No. 4, § 11, § 3; 1983, No. 444, § 2; A.S.A. 1947, § 81-Acts 1949, p. 1420; Acts 1975, No. 330, 1311.
§ 1; 1979, No. 253, § 3; 1981, No. 290,

CASE NOTES

ANALYSIS

Applicability.
Back Injuries.

Applicability.

Plain language of subsection (a) of this section and § 11-9-811 did not authorize the Arkansas Workers' Compensation Commission (Commission) to, sua sponte, order an independent medical examination (IME) after the parties had litigated compensability and additional benefits; these statutes did not give the Commission authority to reserve making determinations on compensability and additional

benefits when those were the only issues litigated by the parties, and the Commission did not err in finding that the administrative law judge exceeded his authority when he ordered an IME. *Burkett v. Exxon Tiger Mart, Inc.*, 2009 Ark. App. 93, 304 S.W.3d 2 (2009).

Back Injuries.

After appellant sustained a compensable injury to his back while taking the front-end loader off of a tractor, a neurologist examined appellant and found no sign of lumbar radiculopathy; he diagnosed appellant with a musculoskeletal injury superimposed on preexisting degenerative

changes in his lower back. When the administrative law judge appointed a doctor to perform an independent medical evaluation pursuant to this section, he recommended surgery based on an MRI, a myelogram, and a post-myelogram CT; the Arkansas Workers' Compensation Commission ignored relevant evidence in finding that appellant was not entitled to additional medical treatment or disability benefits for his back injury. *Diggs v. Cattlemen's Livestock Mkt., Inc.*, 2009 Ark. App. 249, 306 S.W.3d 20 (2009).

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969); *Miller v.*

Everett, 252 Ark. 824, 481 S.W.2d 335 (1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980); *Franklin County Rd. Dep't v. Nordin*, 270 Ark. 177, 603 S.W.2d 477 (1980); *Hamrick v. Colson Co.*, 271 Ark. 740, 610 S.W.2d 281 (1981); *Markham v. K-Mart Corp.*, 4 Ark. App. 310, 630 S.W.2d 550 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983).

11-9-512. Medical services and supplies — Refusal to submit to operation.

Except in cases of hernia, which are specifically covered by § 11-9-523, where an injured person unreasonably refuses to submit to a surgical operation which has been advised by at least two (2) qualified physicians and where the recommended operation does not involve unreasonable risk of life or additional serious physical impairment, the Workers' Compensation Commission, in fixing the amount of compensation, may take into consideration such refusal to submit to the advised operation.

History. Init. Meas. 1948, No. 4, § 11, § 3; 1983, No. 444, § 2; A.S.A. 1947, § 81-Acts 1949, p. 1420; Acts 1975, No. 330, 1311. § 1; 1979, No. 253, § 3; 1981, No. 290,

CASE NOTES

ANALYSIS

In General.
Consideration by Commission.
Operation Not Mandatory.
Recommendation of Physician.
Weight Reduction.

In General.
The provision that authorizes the compensation commission to consider the un-

reasonable refusal of a claimant to submit to recommended surgery is permissive and not mandatory. *Ouachita Marine & Indus. Corp. v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969).

Consideration by Commission.
When fixing the amount of compensation, the compensation commission may consider the refusal of a claimant to submit to recommended surgery only when

that refusal is unreasonable. *Ouachita Marine & Indus. Corp. v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969).

If certain proven surgical procedures are available and there is indication the employee's disability could be diminished by the procedures, and the employee declines to submit to them, the commission certainly has the right to consider this in determining the employee's disability. *Smelser v. S.H. & J. Drilling Corp.*, 267 Ark. 996, 593 S.W.2d 61 (Ct. App. 1980).

Operation Not Mandatory.

This section does not make it mandatory that a claimant undergo a surgical operation even upon the advice of qualified physicians. *Ouachita Marine & Indus. Corp. v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969).

Recommendation of Physician.

Surgery was not recommended by "two qualified physicians" where by the time of the hearing three of the four doctors who initially recommended, no longer recommended surgery because of plaintiff's fear of the surgery. *Thurman v. Clarke Indus., Inc.*, 35 Ark. App. 171, 819 S.W.2d 286 (1991).

Weight Reduction.

Where the record was devoid of facts supporting a conclusion that an employee's weight reduction efforts were not made in good faith, the compensation commission erred in concluding that her failure to lose weight was tantamount to an unreasonable refusal of surgery. *Weller v. Darling Store Fixtures*, 38 Ark. App. 95, 828 S.W.2d 858 (1992).

Where employee's volitional overeating caused his healing period to end, he was not entitled to additional temporary total disability benefits. *Shepherd v. Van Ohlen Trucking*, 49 Ark. App. 36, 895 S.W.2d 945 (1995).

Where employee could not have surgery until he lost weight, but could do so through more conservative means, stomach stapling surgery was not reasonably necessary for treatment of employee's compensable injury. *Shepherd v. Van Ohlen Trucking*, 49 Ark. App. 36, 895 S.W.2d 945 (1995).

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969); *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980); *Franklin County Rd. Dep't v. Nordin*, 270 Ark. 177, 603 S.W.2d 477 (1980); *Hamrick v. Colson Co.*, 271 Ark. 740, 610 S.W.2d 281 (1981); *Markham v. K-Mart Corp.*, 4 Ark. App. 310, 630 S.W.2d 550 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983); *Thurman v. Clarke Indus., Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994).

11-9-513. Medical services and supplies — Approval of charges.

(a) All persons who render services or provide things mentioned in §§ 11-9-508 — 11-9-516 shall submit the reasonableness of the charges to the Workers' Compensation Commission for its approval, and, when so approved, the charges shall be enforceable by the commission in the same manner as is provided for the enforcement of compensation payments.

(b) However, the provisions of this section relating to charges shall not apply where a written contract exists between the employer and the person who renders the service or furnishes the things.

History. Init. Meas. 1948, No. 4, § 11, § 3; 1983, No. 444, § 2; A.S.A. 1947, § 81-Acts 1949, p. 1420; Acts 1975, No. 330, 1311.
§ 1; 1979, No. 253, § 3; 1981, No. 290,

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey—Workers' Compensation, 11 U. Ark. Little Rock L.J. 269.

CASE NOTES

ANALYSIS

Evidence.

Standard of Review.

Unreasonable or Unnecessary Expenses.
Written Contract.

Evidence.

A higher degree of proof is required for proving administration of controlled substances and health services versus supplies. *Tracor/MBA v. Baptist Medical Ctr.*, 29 Ark. App. 198, 780 S.W.2d 26 (1989).

The best evidence of actual drugs administered to a patient is the handwritten hospital patient chart upon which all medications are required to be logged. *Tracor/MBA v. Baptist Medical Ctr.*, 29 Ark. App. 198, 780 S.W.2d 26 (1989).

Standard of Review.

The determination of what constitutes reasonable and necessary medical treatment is a fact question for the workers' compensation commission, and on review, the appellate court may not reverse the commission's decision unless it is convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the commission. *Tracor/MBA v. Baptist Medical Ctr.*, 29 Ark. App. 198, 780 S.W.2d 26 (1989).

Unreasonable or Unnecessary Expenses.

Commission does not have the authority to interpret this section to hold that a worker who sustains a compensable injury will not be personally responsible for payment of medical expenses found to be

unreasonable or unnecessary. Arkansas Workers' Compensation Law does not give the commission any express or implied power to relieve an injured claimant of any medical charges found to be unreasonable. *Savage v. General Indus.*, 23 Ark. App. 188, 745 S.W.2d 644 (1988).

A medical provider whose charges are disallowed by the Arkansas Workers' Compensation Commission as unreasonable or unnecessary may recover from the employee. *Taggart v. Northeast Ark. Rehabilitation Hosp.*, 316 Ark. 39, 870 S.W.2d 717 (1994).

Written Contract.

A provider of services to a workers' compensation claimant, including the claimant's wife who is providing nursing services, is free to contract with an employer or carrier for services rendered or goods supplied; the contract does not constitute a waiver of the employee's right to compensation. *Wasson v. Losey*, 11 Ark. App. 302, 669 S.W.2d 516 (1984).

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969); *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark.

564, 559 S.W.2d 153 (1977); Mohawk Rubber Co. v. Thompson, 265 Ark. 16, 576 S.W.2d 216 (1979); Alred v. Jackson Atl., Inc., 268 Ark. 695, 595 S.W.2d 249 (1980); Model Laundry & Dry Cleaning v. Simmons, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); Frank J. Rooney, Inc. v. Pitts, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); Wise v. Deltic Farm & Timber Co., 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980); Franklin County Rd. Dep't v. Nor-

din, 270 Ark. 177, 603 S.W.2d 477 (1980); Hamrick v. Colson Co., 271 Ark. 740, 610 S.W.2d 281 (1981); Markham v. K-Mart Corp., 4 Ark. App. 310, 630 S.W.2d 550 (1982); Vann v. Dow Chem. Co., 561 F. Supp. 141 (W.D. Ark. 1983); Artex Hydrophonics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983); Tibbs v. Dixie Bearings, Inc., 9 Ark. App. 150, 654 S.W.2d 588 (1983).

11-9-514. Medical services and supplies — Change of physician.

(a)(1) If the employee selects a physician, the Workers' Compensation Commission shall not authorize a change of physician unless the employee first establishes to the satisfaction of the commission that there is a compelling reason or circumstance justifying a change.

(2)(A) If the employer selects a physician, the claimant may petition the commission one (1) time only for a change of physician, and if the commission approves the change with or without a hearing, the commission shall determine the second physician and shall not be bound by recommendations of claimant or respondent.

(B) However, if the change desired by the claimant is to a chiropractic physician, optometrist, or podiatrist, the claimant may make the change by giving advance written notification to the employer or carrier.

(3) Following establishment of an Arkansas managed care system as provided in § 11-9-508, subdivisions (a)(1) and (2) of this section shall become null and void, and thereafter:

(A)(i) The employer shall have the right to select the initial primary care physician from among those associated with managed care entities certified by the commission as provided in § 11-9-508.

(ii) Where the employer has contracted with a managed care organization certified by the commission, the claimant employee, however, shall be allowed to change physicians by petitioning the commission one (1) time only for a change of physician to a physician who must either be associated with the managed care entity chosen by the employer or be the regular treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated by a history of regular treatment prior to the onset of the compensable injury but only if the primary care physician agrees to refer the employee to the managed care entity chosen by the employer for any specialized treatment, including physical therapy, and only if the primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by the managed care entity chosen by the employer.

(iii) Where the employer does not have a contract with a managed care organization certified by the commission, the claimant employee, however, shall be allowed to change physicians by petitioning the

commission one (1) time only for a change of physician, to a physician who must either be associated with any managed care entity certified by the commission or be the regular treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated by a history of regular treatment prior to the onset of the compensable injury, but only if the primary care physician agrees to refer the employee to a physician associated with any managed care entity certified by the commission for any specialized treatment, including physical therapy, and only if the primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by any managed care entity certified by the commission.

(B) A petition for change of physician shall be expedited by the commission.

(b) Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense.

(c)(1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified or registered mail, return receipt requested, a copy of a notice, approved or prescribed by the commission, which explains the employee's rights and responsibilities concerning change of physician.

(2) If, after notice of injury, the employee is not furnished a copy of the notice, the change of physician rules do not apply.

(3) Any unauthorized medical expense incurred after the employee has received a copy of the notice shall not be the responsibility of the employer.

(d) A request for a hearing on a change of physician by either the employer or the injured employee shall be given preference on the commission's docket over all other matters.

(e) Cooperation on the part of both the injured employee and the employer in an effort to select another physician is encouraged.

(f) When compensability is controverted, subsection (b) of this section shall not apply if:

(1) The employee requests medical assistance in writing prior to seeking the same as a result of an alleged compensable injury;

(2) The employer refuses to refer the employee to a medical provider within forty-eight (48) hours after a written request as provided above;

(3) The alleged injury is later found to be a compensable injury; and

(4) The employer has not made a previous offer of medical treatment.

(g) The commission shall by regulation require the inclusion of the information set forth in subsection (f) of this section on all AR-P forms.

History. Init. Meas. 1948, No. 4, § 11, Acts 1949, p. 1420; Acts 1975, No. 330, § 1; 1979, No. 253, § 3; 1981, No. 290, § 3; 1983, No. 444, § 2; A.S.A. 1947, § 81-

1311; Acts 1993, No. 796, § 20; 1999, No. 1167, § 1.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act,

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993.

Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey—Workers' Compensation, 10 U. Ark. Little Rock L.J. 251.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Appeal.
Authorization.
Burden of Proof.
Chiropractor.
Compliance.
Emergency Treatment.
—Incarceration.
Legislative Intent.
Liability for Costs.
Managed Care System.
Notice to Employee.
Notice to Employer.
Out-of-State Physician.
Physician Referral.
Retroactivity.
Right to Change.
Second Injury.
Subsequent Change.

Construction.

This section is silent as to whether the employer or employee has the right to make the choice of an initial treating physician; section 11-9-508 implies that the employer has the right of first choice because the employer has a duty to provide medical services to an injured employee, but that section speaks only to the employer's duty to provide medical services or bear the expense of medical services, not to the method of providing medical treatment. *Welch v. Tri-County Shirt Co.*, 49 Ark. App. 112, 897 S.W.2d 575 (1995).

Applicability.

This section is inapplicable if the authorized treating physician refers the claimant to another doctor for examination or treatment. *American Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998).

Appeal.

Whether treatment is a result of a "referral" rather than a "change of physician" is a factual determination to be made by the commission which will be affirmed on appeal if supported by substantial evidence. *Patrick v. Arkansas Oak Flooring Co.*, 39 Ark. App. 34, 833 S.W.2d 790 (1992).

Authorization.

Evidence supported finding that medical treatment was unauthorized. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

Although claimant testified that he attempted to see his authorized treating physician and that his authorized physician was not available so the nurse referred him to another physician, there was substantial evidence claimant failed to get required authorization where the insurance carrier testified that it refused to authorize payment for second physician's treatment, sent the commission's form A-11 to claimant's attorney and received no response, never received a bill from claimant or from second physician's office, and never received a referral slip showing that authorized physician had referred claimant to second physician. *Pennington v. Gene Cosby Floor & Carpet*, 51 Ark. App. 128, 911 S.W.2d 600 (1995).

Appellate court was obliged to strictly construe and apply the Workers' Compensation Act and where it was not disputed that the employee sought additional unauthorized, non-emergency treatment from three physicians, and employee admitted that the day after her injury her husband brought the form which notified the employee of employee's rights regarding a change of physician and the employee signed the form, the Workers' Compensation Commission's decision that

employee's unauthorized treatment was not compensable was supported by substantial evidence. *Sharp v. Lewis Ford, Inc.*, 78 Ark. App. 164, 78 S.W.3d 746 (2002).

Burden of Proof.

The compelling reason or circumstances burden to justify petition for change of physician is not applicable where the employer has initially selected the physician. *Magic Mart, Inc. v. Little*, 12 Ark. App. 325, 676 S.W.2d 756 (1984).

Chiropractor.

The claimant's right to seek treatment from a chiropractor is not unconditional; he still must prove the treatment is reasonable and necessary and causally related to his compensable injury. *Alexander v. Lee Way Motor Freight*, 15 Ark. App. 41, 689 S.W.2d 3 (1985).

Employer lacked standing to raise constitutional challenge of the exemption of chiropractors from the approval requirements governing change of physicians in this section. *County Mkt. v. Thornton*, 27 Ark. App. 235, 770 S.W.2d 156 (1989), rehearing denied, *County Market v. Thornton*, 27 Ark. App. 235, 771 S.W.2d 793 (1989).

Compliance.

Statutory requirements for a claimant's change of physician pursuant to subdivision (a)(3)(A)(iii) of this section were met where the Arkansas Workers' Compensation Commission explicitly granted the petition based upon the condition that the claimant's family doctor later agreed to comply with the terms of the statute; the statute did not mandate that the physician agree to comply with the terms before the Commission could grant the claimant's petition to a change of physician. *Am. Std. Travelers Indem. Co. v. Post*, 78 Ark. App. 79, 77 S.W.3d 554 (2002).

Emergency Treatment.

This section contemplates an actual selection of a treating physician rather than the occasional use of emergency room facilities, whether for emergency or non-emergency treatment. *Stephens v. St. Vincent Infirmary*, 15 Ark. App. 209, 691 S.W.2d 190 (1985).

The fact that the worker had first sought treatment in an emergency room did not mean that the worker had selected

the emergency room physicians as his treating physician within the meaning of this section, and the worker did not have to petition the Workers' Compensation Commission for permission to change physicians before seeking treatment by the chiropractor. *Stephens v. St. Vincent Infirmary*, 15 Ark. App. 209, 691 S.W.2d 190 (1985).

The facts warranted the conclusion of the commission that an emergency situation existed as contemplated by this section. *Universal Underwriters Ins. Co. v. Bussey*, 17 Ark. App. 47, 703 S.W.2d 459 (1986).

—Incarceration.

A claimant, who was unable to attend work because he was incarcerated in a matter that was ultimately dismissed as a matter of law, has not committed misconduct under this section. *Fleming v. Director, Ark. Emp. Sec. Dep't*, 73 Ark. App. 86, 40 S.W.3d 820 (2001).

A claimant did not commit misconduct where he was incarcerated for allegedly failing to make proper child-support payments, but the case against him was dismissed as a matter of law, notwithstanding the finding by the Appeal Tribunal that the claimant's failure to pay child support resulted in his incarceration and that this was an intentional disregard of his employer's interest. *Fleming v. Director, Ark. Emp. Sec. Dep't*, 73 Ark. App. 86, 40 S.W.3d 820 (2001).

Legislative Intent.

The legislative intent of subdivision (a)(2) of this section was to provide for an alternative form of treatment as an alternative to treatment by a medical doctor. *Haney v. Smith, Doyle & Winters*, 46 Ark. App. 212, 878 S.W.2d 775 (1994).

Liability for Costs.

Conceding, without deciding, that insurance carrier has the right in the first instance to select the physician, it does not follow that injured compensation claimant's later choice of physician exempted insurer and insured from expense of surgical operation, demonstrated with certainty to have been necessary, but opposed by physician selected by insurer. *Caldwell v. Joseph W. Vestal & Son*, 237 Ark. 142, 371 S.W.2d 836 (1963).

Employer liable for medical bills and disability benefits incurred in interim be-

tween employee's petition for change of physicians and its approval. *Southwestern Bell Tel. Co. v. Brown*, 256 Ark. 54, 505 S.W.2d 207 (1974).

Refusal of the commission to pay for cost of medical treatment by new physician was within its discretion. *Rogers v. International Paper Co.*, 1 Ark. App. 164, 613 S.W.2d 844 (1981).

Where claimant failed to comply with the clear intent of the statute and the expense of the new doctor's services, where claimant changed physicians, was not the responsibility of the employer. *American Transp. Co. v. Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983).

Absent compliance with this section in changing physicians, the employer is not liable for a new physician's services. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984); *Crosby v. Micro Plastics, Inc.*, 30 Ark. App. 225, 785 S.W.2d 56 (1990).

Substantial evidence supported commission's finding that it was the claimant's own idea to obtain referral to a neurologist; therefore, the treatment was actually in the nature of a change of physicians and the employer was not responsible for this portion of the treatment. *Patrick v. Arkansas Oak Flooring Co.*, 39 Ark. App. 34, 833 S.W.2d 790 (1992).

Managed Care System.

Subsections (a)(1) and (a)(2) became null and void on September 1, 1995, when a voluntary managed care system was established. *Byars Constr. Co. v. Byars*, 72 Ark. App. 158, 34 S.W.3d 797 (2000).

The fact that the employer had not contracted with a certified managed care entity did not mean that the employee/claimant was free to select any physician he wanted as, under subsection (b), the claimant could not change his physician, except for emergency treatment, and, therefore, he was responsible for services rendered by a new physician. *Byars Constr. Co. v. Byars*, 72 Ark. App. 158, 34 S.W.3d 797 (2000).

Notice to Employee.

The evidence did not support the contention that the claimant received a copy of the documentation explaining her rights and responsibilities concerning a change of physician in a timely manner. The claimant testified that she signed the

rights notification form when she was first hired and not after she was injured; and at the time of her signature the "accident information" section was left blank. She further testified that she could not have signed the form after her injury because of the pain in her shoulder, which was so bad the nurse had to fill out the accident report for her. Finally, the claimant testified that the accident date written on the notification form was not in her handwriting. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 19 S.W.3d 36 (2000).

Subsection (a)(2) of this section requires the required notice to the employee to be in writing; verbal notification does not comply with the requirements of the statute. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 19 S.W.3d 36 (2000).

Second doctor's treatment of a workers' compensation claimant was not subject to the change-of-physician rules in subdivision (c)(1) of this section as there was no Form AR-N signed by the claimant in the appellate record; although the signed Form AR-N was in the Arkansas Workers' Compensation Commission's file, the employer did not introduce the form, ask the Commission to take judicial notice of the form, or ask the claimant if the claimant received and/or signed the form or was advised of the claimant's right to seek a change of physician. *St. Edward Mercy Med. Ctr. v. Phipps*, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 540 (Sept. 7, 2011).

Notice to Employer.

An employer's initial failure to provide prompt and effective medical care and treatment to the injured claimant would not estop the employer from invoking the rule governing the proper procedures to be followed by a claimant prior to changing physicians; therefore, the commission abused its discretion when it ruled that the employer was liable for the payment of physicians who were consulted by the claimant without first giving notice to the employer. *International Paper Co. v. Plunkett*, 4 Ark. App. 314, 630 S.W.2d 552 (1982).

Evidence supported finding notice requirements were sufficiently complied with. *Farmer's Ins. Co. v. Buchheit*, 21 Ark. App. 7, 727 S.W.2d 391 (1987).

Although this section provides that the change of physician requirements out-

lined therein are inapplicable if the employer fails to deliver the claimant a copy of the statutory notice, failure to furnish the notice does not automatically render the employer liable for all treatment or services provided as the result of the subsequent change of physician. An employer who fails to provide the proper notice is only liable for medical treatments and services which are reasonably necessary for the treatment of the employee's injury. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987).

Employer did not controvert employee's change-of-physician request where employee submitted a request for a change of physician only after employer refused to pay certain medical bills because they were not from the original treating physician; employee did not provide the name of the physician when requested to do so and employer was not responsible for knowing the name of the new doctor based on bills received prior to the submission of the request for change. *Jonesboro Human Dev. Ctr. v. Taylor*, 61 Ark. App. 42, 963 S.W.2d 617 (1998).

If a claimant desires a change of physician to a chiropractic physician the claimant may make the change by giving advance written notification to the employer. *Wal-Mart Stores, Inc. v. Stotts*, 74 Ark. App. 428, 58 S.W.3d 853 (2001).

Pursuant to subdivision (2)(B), the Workers' Compensation Commission committed no error when it granted the claimant a change of physician because the claimant gave the employer advance written notice of the desire to change physicians. *Wal-Mart Stores, Inc. v. Stotts*, 49 S.W.3d 667 (2001), substituted opinion, 74 Ark. App. 428, 58 S.W.3d 853 (2001).

Out-of-State Physician.

Employee would be permitted treatment by out-of-state physician, where it would violate the employer's statutory duty to provide medical care if that care was denied simply because there was no medical service provider in Arkansas qualified and willing to provide the service. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997), *supp. op.*, *Clark v. Director, Empl. Sec. Dep't*, 58 Ark. App. 1, 944 S.W.2d 862.

Physician Referral.

Evidence that employee was referred to a specific specialist held sufficient where

employee's treating physician recommended that employee obtain continued care from a hand specialist, provided her with the names of two qualified specialists in that field, and employee obtained treatment from one of them based on this recommendation. *American Greetings Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998).

Referrals to specialists by the treating physician are authorized without making a change of physician. *Jonesboro Human Dev. Ctr. v. Taylor*, 61 Ark. App. 42, 963 S.W.2d 617 (1998).

Arkansas Workers' Compensation Commission erred in denying employee medical benefits for visits to his regular physician where a treating specialist released him and referred him back to his original treating physician; there was nothing in the record that stated or even suggested that employee's regular physician did not remain an authorized physician throughout the case. *Bray v. Int'l Wire Group*, 95 Ark. App. 206, 235 S.W.3d 548 (2006).

Retroactivity.

The commission did not abuse its discretion in the retroactive approval of a change of physicians. *Emerson Elec. Co. v. White*, 262 Ark. 376, 557 S.W.2d 189 (1977) (decision prior to 1981 amendment).

Under the facts claimant was excused from formally petitioning for a change in physicians, and the commission did not abuse its discretion in granting retroactive approval of the change. *Moro, Inc. v. Davis*, 6 Ark. App. 92, 638 S.W.2d 694 (1982).

This section applies retroactively since, prior to the 1981 amendment, it already contained a provision allowing a claimant to change physicians and that amendment did not disturb any vested right or create any new obligation but merely supplied a new or more appropriate remedy to enforce an existing right or obligation; therefore, where claimants' injury occurred before the 1981 amendment took effect, but the hearing before the law judge, his decision and the commission's decision to permit the claimant to change physicians occurred after the amendment, the section as amended would apply. *Pop-eye's Famous Fried Chicken v. Willis*, 7 Ark. App. 167, 646 S.W.2d 17 (1983).

Since the 1981 amendment to this section, the commission no longer has the

broad discretion to retroactively approve change of physicians. *American Transp. Co. v. Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983); *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

Commission abused its discretion in retroactively imposing liability on the employer for medical expenses it had not authorized. *Continental Grain Co. v. Miller*, 9 Ark. App. 317, 659 S.W.2d 517 (1983), superseded by statute as stated in, *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984) (decision under prior law).

Commission could not retroactively approve the change so as to make the employer liable. *American Transp. Co. v. Payne*, 10 Ark. App. 56, 661 S.W.2d 418 (1983).

Since the 1983 amendment to this section, allowing a claimant to change to a chiropractic physician by giving advance written notice to the employer or insurance carrier does not disturb any vested rights or create any new obligations; it merely removes certain procedural barriers and allows an injured employee to seek additional medical treatment. The amendment is entitled to retroactive application. *Alexander v. Lee Way Motor Freight*, 15 Ark. App. 41, 689 S.W.2d 3 (1985).

The 1981 amendment to this section is not limited in application to those workers whose injuries are sustained after its effective date, but is limited to changes in physicians made after that date; ordinarily, however, it cannot be retroactively applied to ratify a change which was unauthorized at the time the change was actually made. *Sterling Stores v. Deen*, 16 Ark. App. 36, 696 S.W.2d 784 (1985).

Where the employer failed to comply with the mandates of this section, the change of physician rules did not apply and the employee was entitled to retroactive approval of a change of physician. *Electro-Air v. Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985).

Right to Change.

Sufficient reason for change of physician found. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), superseded by statute as stated in, *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984) (decided under

prior law); *Popeye's Famous Fried Chicken v. Willis*, 7 Ark. App. 167, 646 S.W.2d 17 (1983); *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984); *Magic Mart, Inc. v. Little*, 12 Ark. App. 325, 676 S.W.2d 756 (1984).

Subdivision (a)(3)(ii) of this section established an absolute, statutory right to a one-time change of physician under the *Arkansas Workers' Compensation Act* where the employer had contracted with a managed care organization and had exercised the right to select the initial primary-care physician; thus, employer's denial of the one-time change of physician as a matter of law failed to fulfill the obligation imposed by § 11-9-508. *Collins v. Lennox Indus., Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002).

Finding in favor of the employee in a workers' compensation action was proper where the employee exercised her absolute, statutory right to a one-time change of physician pursuant to subdivision (a)(3)(A)(ii) of this section; thus, the employer and carrier were required to pay for the initial visit to the new physician in order to fulfill their obligation to provide adequate medical services under the provisions of § 11-9-508. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003).

After the employee's former doctors pronounced his maximum medical improvement from a back injury and assigned a five-percent impairment rating, the employee petitioned and received a change of physicians in accordance with subdivision (a)(3)(A) of this section. Because the employee failed to show that an EMG diagnostic study recommended by his new doctor was reasonably necessary, the *Arkansas Workers' Compensation Commission* had a substantial basis for denying payment. *Goyne v. Crabtree Contr. Co.*, 2009 Ark. App. 200, 301 S.W.3d 16 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 874 (Apr. 22, 2009).

Second Injury.

Where after suffering a second injury similar to the first, the claimant's employer directed her to a different doctor for treatment of the second injury, the claimant did not violate the provision of this section requiring her to get authorization from the commission in order to change

physicians, because the change of physicians was directed by the employer and not initiated by the claimant. *Home Ins. Co. v. Meeker*, 9 Ark. App. 201, 657 S.W.2d 215 (1983).

Subsequent Change.

Where employer and employee mutually agreed to change of physician from the company doctor to employee's family doctor, without the commission being petitioned for a change, the mutually agreed upon change was not employee's first and only change under this section; therefore, employee could petition commission for subsequent change of physician. *Magic Mart, Inc. v. Little*, 12 Ark. App. 325, 676 S.W.2d 756 (1984).

The Workers' Compensation Commission did not err in interpreting this section to allow claimant to change physicians a second time under the facts of the case. *Sanyo Mfg. Corp. v. Farrell*, 16 Ark. App. 59, 696 S.W.2d 779 (1985).

Where the doctor who was treating claimant wished to have claimant examined by another doctor, the treatment by the other doctor was a referral, not a change of physicians. *Electro-Air v. Vilines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985); *White v. Lair Oil Co.*, 20 Ark. App. 136, 725 S.W.2d 10 (1987).

Arkansas Workers' Compensation Commission did not err in permitting a second change of physician for the employee under § 11-9-514(a)(3)(A)(iii) as there was substantial evidence that the first physician did not act in a manner consistent with being the employee's physician. *St. Joseph's Mercy Health Ctr. v. Lamb*, 97 Ark. App. 248, 248 S.W.3d 514 (2007).

Arkansas Workers' Compensation Commission did not err in awarding an employee additional benefits because substantial evidence supported its finding that additional medical treatment was reasonably necessary and that the employee remained within his healing period and unable to earn wages; the employer

failed to give the employee the change-of-physician form after his injury, and thus, the employee was not required to petition the Commission in order to be treated by a competent doctor. *St. Joseph's Mercy Med. Ctr. v. Redmond*, 2012 Ark. App. 7, — S.W.3d — (2012).

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969); *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980); *Franklin County Rd. Dep't v. Nordin*, 270 Ark. 177, 603 S.W.2d 477 (1980); *Hamrick v. Colson Co.*, 271 Ark. 740, 610 S.W.2d 281 (1981); *Markham v. K-Mart Corp.*, 4 Ark. App. 310, 630 S.W.2d 550 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983); *Taco Bell v. Finley*, 38 Ark. App. 11, 826 S.W.2d 313 (1992); *TEC v. Falkner*, 38 Ark. App. 13, 827 S.W.2d 661 (1992); *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996).

11-9-515. Medical services and supplies — Spiritual treatment.

(a) When an employer and employee so agree in writing, nothing in this chapter shall be construed to prevent an employee whose injury or disability has been established in accordance with the provisions of this chapter from relying in good faith on treatment by prayer or spiritual means alone, in accordance with the tenets and practice of a recognized

church or religious denomination by a duly accredited practitioner thereof, and having nursing services appropriate therewith, without suffering loss or diminution of the compensation benefits under this chapter.

(b) However, the employee shall submit to all physical examinations required by this chapter.

(c) The cost of the treatment and nursing care shall be paid by the employee unless the employer agrees to make the payment.

History. Init. Meas. 1948, No. 4, § 11, § 3; 1983, No. 444, § 2; A.S.A. 1947, § 81-Acts 1949, p. 1420; Acts 1975, No. 330, 1311.
§ 1; 1979, No. 253, § 3; 1981, No. 290,

CASE NOTES

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969); *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980); *Franklin County Rd. Dep't v. Noradin*, 270 Ark. 177, 603 S.W.2d 477 (1980); *Hamrick v. Colson Co.*, 271 Ark. 740, 610 S.W.2d 281 (1981); *Markham v. K-Mart Corp.*, 4 Ark. App. 310, 630 S.W.2d 550 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983).

11-9-516. Medical services and supplies — Information furnished by provider.

(a)(1) Every hospital or other person furnishing the injured employee with medical services shall permit its records to be copied by and shall furnish full written information to the Workers' Compensation Commission, the Workers' Compensation Fraud Investigation Unit, the employer, the carrier, and the employee or the employee's dependents.

(2) The reasonable cost of copies as set forth in Workers' Compensation Commission Rule 30 shall be paid by the one requesting them to the health care or medical service provider furnishing them.

(b) No person who in good faith pursuant to subsection (a) of this section or pursuant to rules and regulations established by the commission reports medical information shall incur legal liability for the disclosure of the information.

History. Init. Meas. 1948, No. 4, § 11, Acts 1949, p. 1420; Acts 1979, No. 253, § 3; 1981, No. 290, § 3; 1983, No. 444, § 2; A.S.A. 1947, § 81-1311; Acts 1993, No. 796, § 21.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act,

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969); *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Alred v. Jackson Atl.,*

Inc., 268 Ark. 695, 595 S.W.2d 249 (1980); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980); *Franklin County Rd. Dep't v. Nordin*, 270 Ark. 177, 603 S.W.2d 477 (1980); *Hamrick v. Colson Co.*, 271 Ark. 740, 610 S.W.2d 281 (1981); *Markham v. K-Mart Corp.*, 4 Ark. App. 310, 630 S.W.2d 550 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983); *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983).

11-9-517. Medical services and supplies — Rules and regulations.

The Workers' Compensation Commission is authorized to establish rules and regulations, including schedules of maximum allowable fees for specified medical services rendered with respect to compensable injuries, for the purpose of controlling the cost of medical and hospital services and supplies provided pursuant to §§ 11-9-508 — 11-9-516.

History. Init. Meas. 1948, No. 4, § 11, Acts 1949, p. 1420; Acts 1986 (2nd Ex. Sess.), No. 10, § 4; A.S.A. 1947, § 81-1311.

CASE NOTES

Cited: *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Downs v. Miller*, 224 Ark. 35, 271 S.W.2d 623 (1954); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969); *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335

(1972); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977); *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979); *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980); *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App.

1980); Franklin County Rd. Dep't v. Nor-
din, 270 Ark. 177, 603 S.W.2d 477 (1980);
Hamrick v. Colson Co., 271 Ark. 740, 610
S.W.2d 281 (1981); Markham v. K-Mart
Corp., 4 Ark. App. 310, 630 S.W.2d 550
(1982); Vann v. Dow Chem. Co., 561 F.
Supp. 141 (W.D. Ark. 1983); Artex Hydro-

phonics, Inc. v. Pippin, 8 Ark. App. 200,
649 S.W.2d 845 (1983); Tibbs v. Dixie
Bearings, Inc., 9 Ark. App. 150, 654
S.W.2d 588 (1983); Tracor/MBA v. Baptist
Medical Ctr., 29 Ark. App. 198, 780 S.W.2d
26 (1989).

11-9-518. Weekly wages as basis for compensation.

(a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

History. Init. Meas. 1948, No. 4, § 12,
Acts 1949, p. 1420; A.S.A. 1947, § 81-
1312.

RESEARCH REFERENCES

ALR. Workers' Compensation: Value of Employer-Provided Room, Board, or Clothing as Factor in Determining Basis for or Calculation of Amount of Compensation Under State Workers' Compensation Statute. 48 A.L.R.6th 387.

U. Ark. Little Rock L.J. Seventeenth Annual Survey of Arkansas Law — Workers' Compensation, 17 U. Ark. Little Rock L.J. 453.

CASE NOTES

ANALYSIS

In General.
Construction.
Burden of Proof.
Evidence.
Exceptional Circumstances.
Joint Employment.

Seasonal Employee.
Temporary Employee.
Time Disability Occurred.
Weekly Wage Determination.

In General.

This chapter does not provide benefits for an injured worker based upon his

earning capacity, wages earned while working full time, or the amount the injured worker would be earning if it were not for injury, but allows benefits based on his average weekly wage. *Curtis v. Ermert Funeral Home & Ins. Co. of N. Am.*, 4 Ark. App. 274, 630 S.W.2d 57 (1982).

Construction.

The term "compensation" as used in this section refers to money benefits paid to the injured employee for disability. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Burden of Proof.

Employee has the burden of proving that he was bound by contract to work 40 hours each workweek if the work was made available. *A & C Servs., Inc. v. Sowell*, 44 Ark. App. 150, 870 S.W.2d 764 (1994).

Evidence.

There was no substantial evidence as to injured man's weekly pay prior to his heart attack, or that his loss decreased his earning capacity beyond the amount awarded him. *Blann v. Harvill-Byrd Elec. Co.*, 249 Ark. 456, 459 S.W.2d 567 (1970).

Computation of benefits on weekly basis required even where deceased, due to seasonal nature of lumber industry, did not work full, regular weeks but worked whenever work was available. *Gill v. Ozark Forest Prods., Inc.*, 255 Ark. 951, 504 S.W.2d 357 (1974); *Herman Young Lumber Co. v. Koon*, 30 Ark. App. 162, 785 S.W.2d 44 (1990).

Where method used by the commission to compute benefits was improper because it used less than a full time work week but there were no exceptional circumstances that would make it just and fair to both parties to take the wages earned by decedent in the preceding year, divide the amount by fifty-two, and use that figure as the average weekly wage, the commission's award would be affirmed. *Farm Air Corp. v. Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984).

Award of minimum death benefits was warranted by evidence of decedent's earnings. *Wright v. Tyson Foods, Inc.*, 28 Ark. App. 261, 773 S.W.2d 110 (1989).

Exceptional Circumstances.

There were no "exceptional circumstances" requiring application of subsec-

tion (c) of this section, because while the Arkansas Workers' Compensation Commission urged that the claimant would earn more in fifty-two weeks than his contracted amount, this was merely speculative and there was simply no evidence in the record regarding the claimant's past or prospective annual earnings with this or any other employer. The claimant was engaged in seasonal employment and at the time of his injury was earning \$1020 per week for nine weeks of work, and in arriving at his weekly compensation rate the Commission stated that the claimant was contracted to earn \$9180 over a nine-week period, which averaged \$1020 per week, and the Commission divided the \$9180 by fifty-two weeks, which equaled \$176.54 per week, which was multiplied by 66 2/3 percent for a weekly compensation rate of \$118 per week. *Sierra v. Griffin Gin*, 100 Ark. App. 113, 265 S.W.3d 129 (2007), rehearing denied, *Sierra v. Griffen Gin*, — Ark. App. —, — S.W.3d —, 2007 Ark. App. LEXIS 775 (Nov. 7, 2007), superseded, 374 Ark. 320, 287 S.W.3d 556 (2008).

Where workers' compensation claimant admitted that the claimant did not always work a full 40-hour week because the employer allowed the claimant to take unpaid leave when the claimant wanted, the Arkansas Workers' Compensation Commission properly found that exceptional circumstances existed because the claimant took unpaid time off from work for personal reasons; thus, the claimant's annual earnings were divided by 52 weeks without taking into account vacation time. *Maulding v. Price's Util. Contrs., Inc.*, 2009 Ark. App. 776, 358 S.W.3d 915 (2009), rehearing denied, 2010 Ark. App. 51, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 222 (Apr. 22, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 227 (Apr. 22, 2010).

Joint Employment.

Where the claimant sustained a compensable injury while working, but was also employed in another job, his compensation benefits were properly based on his wages earned at job in which he was injured rather than on the combined incomes of his jobs. *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980).

The clear wording of the statutory definition of "wages" in § 11-9-102 makes no provision for combining wages from concurrent employments in determining benefits. *Curtis v. Ermerit Funeral Home & Ins. Co. of N. Am.*, 4 Ark. App. 274, 630 S.W.2d 57 (1982).

This section concerns itself exclusively with the determination of "average weekly wage," and the definition of the word "wage" is controlled and supplied by § 11-9-102(8) (now (19)): it makes no provision for combining those wages with concurrent employment whether similar or otherwise in determining benefits, and the fact that the word "wage" is not redefined in the catchall proviso to this section is not controlling since that definition is supplied by § 11-9-102(8) (now (19)). *Curtis v. Ermerit Funeral Home & Ins. Co. of N. Am.*, 4 Ark. App. 274, 630 S.W.2d 57 (1982).

The proper method for determination of the average weekly wage of an employee who holds two concurrent jobs with the same employer and suffers a compensable injury while performing one of them is to combine the wages paid for the two jobs. *Marianna School Dist. v. Vanderburg*, 16 Ark. App. 271, 700 S.W.2d 381 (1985).

When a joint employment situation exists, both employers are liable for workers' compensation. *Cook v. Recovery Corp.*, 50 Ark. App. 49, 900 S.W.2d 212 (1995), *aff'd*, 322 Ark. 707, 911 S.W.2d 581 (1995).

Employee who received two paychecks from separate employers for the same eight hour shift was appropriately limited to the statutory benefits cap based as a result of combining his wages even though his benefits, if calculated separately for each employer, would not have triggered the cap. *Cook v. Recovery Corp.*, 322 Ark. 707, 911 S.W.2d 581 (1995).

Seasonal Employee.

Where the claimant's contract of hire provided for a 40-hour workweek whenever work was available, subdivision (a)(1) of this section required that the compensation rate be computed on the basis of a full-time workweek, despite the seasonal nature of the employment. *Chapel Gardens Nursery v. Lovelady*, 47 Ark. App. 114, 885 S.W.2d 915 (1994).

Temporary Employee.

An averaging is required of the earnings of an employee of a temporary employ-

ment company who at the time of injury is working on a job assignment of less than a full week. *Boyd v. Metro Temporaries*, 41 Ark. App. 12, 846 S.W.2d 668 (1993), *aff'd*, 314 Ark. 479, 863 S.W.2d 316 (Ark. 1993).

The Workers' Compensation Commission erred in finding that a temporary employee was entitled only to the statutory minimum of weekly compensation. *Boyd v. Metro Temporaries*, 41 Ark. App. 12, 846 S.W.2d 668 (1993), *aff'd*, 314 Ark. 479, 863 S.W.2d 316 (Ark. 1993).

If a temporary employee is working on a job assignment involving a full workweek at the time of injury, then only the wage rate for that particular full workweek should be used as the basis for computing compensation. *Boyd v. Metro Temporaries*, 41 Ark. App. 12, 846 S.W.2d 668 (1993), *aff'd*, 314 Ark. 479, 863 S.W.2d 316 (Ark. 1993).

Where the employer of a temporary employee anticipated assigning employee to different jobs, with different hours, and at different wages, and did so, the contract of hire in force at the time of the accident was the employer's contract with the employee, not the particular job assignment; accordingly, the injured employee was entitled to receive benefits based upon averaging the hours worked at the different jobs. *Metro Temporaries v. Boyd*, 314 Ark. 479, 863 S.W.2d 316 (Ark. 1993).

Time Disability Occurred.

Where claimant suffered a compensable injury, received medical treatment, returned to his regular job and continued to work until he became totally disabled, claimant is entitled to the maximum weekly benefit rate in effect at the time the disability occurred, and this rate is based on the wages being earned on the date of the accident. *Montgomery v. Delta Airlines*, 31 Ark. App. 203, 791 S.W.2d 716 (1990).

Weekly Wage Determination.

Average weekly pay of injured employees whose rates of pay were increased within a year prior to the injury was to be ascertained by including amount previously received. *Mack Coal Co. v. Hill*, 204 Ark. 407, 162 S.W.2d 906 (1942) (decision under prior law).

Periods of nonoperation of business must be counted as lost time thereby reducing the divisor to the number of

weeks remaining as contrasted with 52. *Mack Coal Co. v. Hill*, 204 Ark. 407, 162 S.W.2d 906 (1942) (decision under prior law).

The proviso of former section that "results just and fair to both parties will thereby be obtained" applied only to those cases where reasonable men would agree that the methods of computing wages defeated the law's obvious purpose. *Mack Coal Co. v. Hill*, 204 Ark. 407, 162 S.W.2d 906 (1942) (decision under prior law).

Under former Workers' Compensation Act the basis for compensation was the average weekly wage, which included wages paid by the employer and subsistence allowances under the Servicemen's Readjustment Act. *Wood Mercantile Co. v. Cole*, 213 Ark. 68, 209 S.W.2d 290 (1948) (decision under prior law).

Where the employee is working on a piece-rate basis, bonus, holiday and vacation pay is not to be included in the computation of the average weekly wage. *Tabor v. Levi Strauss & Co.*, 33 Ark. App. 71, 801 S.W.2d 311 (1990).

Where union contract specifically provided overtime was to be paid at one and one-half times the employee's regular rate of pay, overtime earnings were ordered to be calculated by including all earnings received for work performed in excess of eight hours in any one day and then dividing overtime earnings by the number of weeks worked by the employee not to exceed a period of 52 weeks preceding the accident, the number of weeks to be reduced by those weeks in which the employee did not work. *Tabor v. Levi Strauss & Co.*, 33 Ark. App. 71, 801 S.W.2d 311 (1990).

Temporary employee is entitled to receive benefits based upon an averaging of the hours worked and wages received at the different jobs to which he was assigned. *A & C Servs., Inc. v. Sowell*, 44 Ark. App. 150, 870 S.W.2d 764 (1994).

Where the claimant was injured in 1977, but was able to continue working without loss of income until two accidents which occurred in 1996, his date of accident was 1996 and his compensation rate would be based on his 1996 earnings. *Inskeep v. Emerson Elec. Co.*, 64 Ark. App. 101, 983 S.W.2d 132 (1998).

Employee's contract provided for the employee to teach 188 days, and stated that she would be docked \$143.62 per

diem for any absences during any leave-without-pay status; thus, the compensation was correctly computed on the average weekly wage earned by the employee, which was based on a 39-week year, not a 52-week year. *Magnet Cove Sch. Dist. v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003).

Where employee had been promoted shortly before her accident, the Workers' Compensation Commission properly calculated her average weekly wage using employee's hourly wage at the time of the accident plus overtime for the previous year where, at the time of and after her accident, she was working extensive hours at that wage, despite occasionally performing other jobs at a lower wage. *Cracker Barrel v. Lassiter*, 87 Ark. App. 286, 190 S.W.3d 911 (2004).

Arkansas Workers' Compensation Commission's determination of employee's weekly compensation rate was upheld where the Commission followed a method of calculation consistent with its statutory call; the Commission's refusal to dilute employee's average weekly wage based on time that he missed due to excused leave did not produce a double recovery. *Rheem Mfg. v. Bark*, 97 Ark. App. 224, 245 S.W.3d 716 (2006).

Per diem payments to an employee to reimburse him for meals, lodging, and incidentals should have been included in the calculation of his average weekly wage as in subdivision (a)(1) of this section because they fell within the definition of wages under § 11-9-102(19). The per diem payments saved the employee from expending other funds to acquire those advantages, and the employee had the option to retaining any unused per diem funds, thereby increasing his income. *Plane Techs v. Keno*, 103 Ark. App. 121, 286 S.W.3d 774 (2008).

Arkansas Workers' Compensation Commission did not err in basing an employee's benefits on a thirty-seven-and-one-half hour workweek, which was a full workweek for the employee, because no one disputed the employee's testimony that although he was at work forty hours per week, he did not get paid for his thirty-minute lunch break, so he worked thirty-seven-and-one-half hours per week, and while there were weeks in which the employee did not work thirty-seven-and-one-half hours, he testified that that was

his normal workweek; subdivision (a)(1) of this section clearly mandates that in no case shall compensation be computed on less than a full-time workweek. *Johnson v. Abilities Unlimited, Inc.*, 2009 Ark. App. 866, — S.W.3d — (2009).

Arkansas Workers' Compensation Commission's decision to deduct business expenses from a sole proprietorship's gross receipts for the purposes of determining the average weekly wage of a self-employed claimant was just and fair under subsection (c) of this section. *Vite v. Vite*, 2010 Ark. App. 565, — S.W.3d — (2010).

Evidence supported the calculation of an employee's \$340 average weekly wage

under subsection (a) of this section because the employee testified that she made \$8.50 per hour and that she was hired to work a 40-hour week. *Pafford Med. Billing Servs. v. Smith*, 2011 Ark. App. 180, — S.W.3d — (2011).

Arkansas Workers' Compensation Commission properly calculated his average weekly wage under this section by taking the claimant's total pay for the 51 weeks leading up to the accident and dividing it by 51. *Lankford v. Crossland Constr. Co.*, 2011 Ark. App. 416, — S.W.3d — (2011).

Cited: *Ryan v. NAPA*, 266 Ark. 802, 586 S.W.2d 6 (Ct. App. 1979).

11-9-519. Compensation for disability — Total disability.

(a) In case of total disability, there shall be paid to the injured employee during the continuance of the total disability sixty-six and two-thirds percent (66⅔%) of his or her average weekly wage.

(b) In the absence of clear and convincing proof to the contrary, the loss of both hands, both arms, both legs, both eyes, or of any two (2) thereof shall constitute permanent total disability.

(c) In all other cases, permanent total disability shall be determined in accordance with the facts.

(d)(1) No more often than annually, the carrier or self-insured employer or the Death and Permanent Total Disability Trust Fund may require an injured worker receiving permanent total disability benefits to, as of the date thereof, certify on forms provided by the Workers' Compensation Commission that he or she is permanently and totally disabled and not gainfully employed.

(2) Notice of the requirement shall be made by certified mail.

(3) Failure of the employee to so certify within thirty (30) days after receipt of the notice shall permit the discontinuance of benefits without penalty until otherwise ordered by the commission.

(e)(1) "Permanent total disability" means inability, because of compensable injury or occupational disease, to earn any meaningful wages in the same or other employment.

(2) The burden of proof shall be on the employee to prove inability to earn any meaningful wage in the same or other employment.

(f) In considering a claim for permanent disability, the commission and the courts shall not consider the odd-lot doctrine.

(g)(1)(A) The commission, after a public hearing, shall adopt an impairment rating guide to be used in the assessment of anatomical impairment.

(B) The guide shall not include pain as a basis for impairment.

(2) The impairment rating guide adopted by the commission shall be subject to review by the General Assembly before April 1 of every odd-numbered year beginning with the regular session of 1999.

History. Init. Meas. 1948, No. 4, § 13, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 2, Acts 1957; Acts 1975 (Extended Sess., 1976), No. 1227, § 8; 1981, No. 290, § 4; A.S.A. 1947, § 81-1313; reen. Acts 1987, No. 1015, § 8; Acts 1993, No. 796, § 22; 1997, No. 251, § 1; 1997, No. 260, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 1015, § 8. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any

other 1987 legislation and that such other legislation would be controlling in the event of conflict.

As enacted, present subsection (g) began: "On or before July 1, 1994."

Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

ALR. Workers' Compensation: Value of Expenses Reimbursed by Employer as Factor in Determining Basis for or Calcula-

tion of Amount of Compensation Under State Workers' Compensation Statute. 63 A.L.R.6th 187.

CASE NOTES

ANALYSIS

Constitutionality.

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Constitutionality.

Statutes limiting recovery for permanent total disability resulting from a second injury while working for the same employer, but leaving open ended the recovery for permanent total disability from a single injury are not unconstitutional as an unreasonable classification, since the purpose is to encourage employers to retain injured employees. *Corbitt v. Mohawk Rubber Co.*, 256 Ark. 932, 511 S.W.2d 184 (1974).

In General.

Benefits claimant was not awarded permanent total disability after an amputation of four fingers in a work-related accident since she could have performed other jobs. The employer offered her another position, which would have allowed her to sit as needed and do janitorial work in

administrative offices. *Crelia v. Rheem Mfg. Co.*, 99 Ark. App. 73, 257 S.W.3d 115 (2007).

Applicability.

Claimant was not entitled to temporary total disability benefits governed by the 1993 amendment of this chapter where she was injured before the effective date of Acts 1993, No. 796, even though she did not suffer a loss in earnings until after the act's effective date. *City of Fouke v. Buttrum*, 59 Ark. App. 219, 956 S.W.2d 193 (1997).

Arkansas Workers' Compensation Commission erred in interpreting §§ 11-9-521(g) and -519(b) as barring an employee, who suffered a fifty-percent impairment to his left lower extremity, from recovering permanent total disability benefits because he had suffered a scheduled compensable injury to his right leg. In finding that a scheduled-injury claimant was prohibited from entitlement to permanent total disability benefits in excess of the percentage of his physical impairment and that such a claim had to meet the multiple-loss requirements, the Commission impermissibly expanded the statutory prohibition of a claim for permanent partial disability benefits except in a case of multiple losses. *McDonald v. Batesville Poultry Equip.*, 90 Ark. App. 435, 206 S.W.3d 908 (2005).

Burden of Proof.

Where the claimant was prima facie within the former "odd-lot" category based

on the Workers' Compensation Commission's factual findings of disability and borderline mental retardation along with the undisputed evidence of claimant's advanced age and lack of education or vocational training, the burden shifted to the employer to show evidence that suitable work was regularly and continuously available to the claimant, and where the employer failed to do so, the claimant was awarded total and permanent disability benefits. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992), rehearing denied, 40 Ark. App. 113, 846 S.W.2d 188 (1993), superseded by statute as stated in, *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999).

Although employer argued that the only evidence of employee having muscle spasms was her self-serving testimony and the subjective history that she gave to an emergency room nurse five months after her alleged incident, it was undisputed that, at the time of the accident, the employee was diagnosed as having suffered thoracic and lumbar contusion and strain and that the company physician prescribed a medication for the relief of muscle spasms and other musculoskeletal conditions; thus, employer's argument that there was no medical evidence supporting objective findings of an injury was rejected and employee was entitled to temporary total disability benefits. *Fred's, Inc. v. Jefferson*, 89 Ark. App. 95, 200 S.W.3d 477 (2004), *aff'd*, 361 Ark. 258, 206 S.W.3d 238 (2005).

Substantial evidence supported a determination by the Arkansas Workers' Compensation Commission that an employee was not permanently and totally disabled pursuant to subsection (e) of this section, as the employee made no attempt to look for work since his injuries, he offered no functional capacity evaluation or permanent physician's restrictions, and he was still able to engage in at least some recreational activities. *Hensley v. Cooper Tire & Rubber Co.*, 2011 Ark. App. 593, — S.W.3d — (2011).

Arkansas Workers' Compensation Commission did not err in finding that an employee failed to prove that the employee was permanently and totally disabled under subdivision (e)(1) of this section after a 400-pound steel bar hit the employee on top of the head because although the employee testified that the

employee was still in pain after neck surgery, the employee acknowledged that the employee's symptoms had improved since that time. *Kelley v. Cooper Std. Auto.*, 2011 Ark. App. 665, — S.W.3d — (2011).

Compensation.

Employees of cleaning establishment who worked for the most part at a ranch owned by insured which was maintained primarily for advertising value were entitled to compensation. *Great Am. Indem. Co. v. Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953).

If claimant would have been able to work longer if his injuries had not occurred he is entitled to compensation. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

After the healing period has ended, an injured worker who is totally unable to earn in the same or any other employment the wages he or she was receiving at the time of the injury is entitled to receive current total disability benefits during the continuance of that total disability. *Guffey v. Arkansas Secretary of State*, 18 Ark. App. 54, 710 S.W.2d 836 (1986), *rev'd*, 291 Ark. 624, 727 S.W.2d 826 (1987).

Disability.

Substantial evidence supported the award of additional temporary total disability benefits to a claimant based on the injuries he sustained when the bucket of the front-end loader he was driving unexpectedly dropped, causing his face to hit the steering wheel and dashboard. The Arkansas Worker's Compensation Commission credited an ear, nose, and throat specialist's opinion that, after nearly a year of treatment by the specialist, the claimant was unable to perform work of any kind, that he later reached a plateau with regard to the treatment provided by the specialist, but that he needed complete diagnostic testing before a final determination regarding maximum medical improvement could be made. *Owens Planting Co. v. Graham*, 102 Ark. App. 299, 284 S.W.3d 537 (2008).

Employee should have been awarded temporary total disability benefits where his healing period did not end on November 4, 2004, and the employer and insurer refused to authorize treatment that would be administered for the healing and alleviation of the employee's condition; the

employee had not reached maximum medical improvement. *Luten v. Xpress Boats & Backtrack Trailers*, 103 Ark. App. 24, 285 S.W.3d 710 (2008).

After appellant sustained a compensable injury to his back on January 20, 2005, while taking the front-end loader off of a tractor, his employer and its insurer, paid temporary total disability (TTD) compensation to appellant through June 29, 2005; at that time a doctor assigned, and appellees paid out, a five-percent impairment rating. Where two doctors recommended surgery based on appellant's symptoms of radiculopathy, positive straight leg tests, an MRI, a nerve conduction study, and a CT, the Arkansas Workers' Compensation Commission ignored relevant evidence in finding that appellant was not entitled to additional medical treatment or TDD benefits for his back injury. *Diggs v. Cattlemen's Livestock Mkt., Inc.*, 2009 Ark. App. 249, 306 S.W.3d 20 (2009).

Where the employee sustained compensable knee and back injuries when he fell off a flatbed trailer on May 4, 2005, he was provided workers' compensation benefits and remained off work until December 6, 2005, when a doctor assigned him a five-percent anatomical impairment rating; when the employee returned to the doctor on August 8, 2006, the doctor did not take him off work. When the employee's doctor signed a letter on February 12, 2007, at the request of the employee's attorney to confirm that it was necessary for the employee to remain off work pending additional treatment for his compensable injury, the Arkansas Workers' Compensation Commission considered the doctor's two inconsistent acts and resolved the issue against the doctor's opinion that the employee's condition precluded him from working; the Commission did not err by denying the employee's claim for additional temporary-total disability benefits and medical treatment. *Pyle v. Woodfield, Inc.*, 2009 Ark. App. 251, 306 S.W.3d 455 (2009).

Substantial evidence supported the Arkansas Workers' Compensation Commission's decision that an employee did not meet his burden of proving his entitlement to permanent-total or wage-loss disability benefits because the employee's compensable injury did not require surgery, he was issued only a one-percent

impairment rating for it, the functional capacity evaluation evaluator concluded that the employee was capable of performing medium work, and neither of the employee's treating physicians opined that he was permanently and totally disabled or that he could not work, and the employee never presented any evidence that no "suitable work" existed for him; there was substantial evidence supporting the Commission's finding that the employee was not motivated to return to work because the employee admitted that he had not looked for work within the medium-work classification and that he had not contacted the employer to inquire about positions that were within his restrictions, and the Commission did not arbitrarily disregard the credibility of the employee and his complaints of pain. *White v. Ark. State Highway & Transp. Dep't*, 2009 Ark. App. 768, — S.W.3d — (2009).

Sixty-one-year-old workers' compensation claimant with a compensable back injury failed to prove that the claimant was permanently and totally disabled because although the claimant could no longer be a construction worker, a functional capacity evaluation showed that the claimant had transferable skills, a college degree, experience, and was capable of performing light duty work. *Maulding v. Price's Util. Contrs., Inc.*, 2009 Ark. App. 776, 358 S.W.3d 915 (2009), rehearing denied, 2010 Ark. App. 51, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 222 (Apr. 22, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 227 (Apr. 22, 2010).

There was a substantial basis to support the Workers' Compensation Commission's finding that an employee failed to prove that he was permanently and totally disabled because there was evidence demonstrating that the employee was not completely unable to earn meaningful wages; functional capacity evaluations rated the employee in the light-duty category of work, and even after his third surgery, the employee worked for more than a year in a light capacity. *Tucker v. Cooper Std. Auto., Inc.*, 2010 Ark. App. 7, — S.W.3d — (2010).

Substantial evidence supported the denial of permanent total disability benefits under subdivision (e)(1) of this section, although the claimant presented medical evidence of an inability to work, because

the administrative law judge was more persuaded by the opinions of the claimant's treating physician and the functional capacity evaluator that the claimant was capable of performing light-duty work. *Evans v. Bemis Co.*, 2010 Ark. App. 65, — S.W.3d — (2010).

Arkansas Workers' Compensation Commission's opinion displayed a substantial basis for denying an employee's claims for permanent total disability under the Worker's Compensation or additional wage-loss benefits because noting the employee's testimony and the reports of his surgeon, the Commission concluded that the only change in physical condition related to his compensable cervical injuries was the fact that his cervical problems had dramatically improved following his third cervical surgery; the Commission found that the employee was vastly improved since its prior decision awarding him benefits. *Martin v. Jensen Constr. Co.*, 2010 Ark. App. 294, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 448 (May 12, 2010).

Employee was properly found not disabled under this section for back strain based on a lack of objective medical evidence and her complete lack of credibility. She denied under oath having prior back problems, yet her medical history was full of back complaints and treatments based on scoliosis and a prior car accident. *Harris v. Weyerhaeuser Co.*, 2011 Ark. App. 672, — S.W.3d — (2011).

Award of permanent total disability benefits to the employee was appropriate pursuant to subsection (c) of this section because the employer offered no proof to rebut the medical opinions that the employee's condition prevented him from working. The fact that the employee testified that he drove on a limited basis and that he drove some 305 miles over 13 hours to attend the hearing was not sufficient to prove that he could earn meaningful wages. *City of Forrest City v. Mun. League WCT*, 2011 Ark. App. 736, — S.W.3d — (2011).

Claimant was not entitled to permanent-total-disability benefits under subdivision (e)(1) of this section because, following the claimant's most recent injury, his treating physicians were unable to make any new objective findings, and a functional-capacity evaluation indicated that

he was able to perform medium-duty work. *Lunday v. Entergy Ark., Inc.*, 2012 Ark. App. 169, — S.W.3d — (2012).

In light of the claimant's scarce attempts to return to work, her changing testimony regarding her abilities, and the lack of any opinion by a medical or vocational expert that she was unable to work, the Arkansas Workers' Compensation Commission's decision denying her permanent and total disability benefits under subdivision (e)(1) of this section was supported by substantial evidence. *Milton v. K-Tops Plastic Mfg. Co.*, 2012 Ark. App. 175, — S.W.3d — (2012).

Although the employee might be right that the factors considered by the Workers' Compensation Commission would also support a claim of total and permanent disability under this section, the court could not make that determination because the Commission's finding of permanent disability was supported in part by the improper odd-lot doctrine finding, and thus the court reversed in this regard and remanded. *Am. Eagle Airlines v. Berndt*, 2012 Ark. App. 220, — S.W.3d — (2012).

—In General.

Disability may be paid notwithstanding the fact that compensation was received for specific loss under § 11-9-521. *McNeely v. Clem Mill & Gin Co.*, 241 Ark. 498, 409 S.W.2d 502 (1966); *Meadowlake Nursing Home v. Sullivan*, 253 Ark. 403, 486 S.W.2d 82 (1972); *Cooper Indus. Prods., Inc. v. Worth*, 256 Ark. 394, 508 S.W.2d 59 (1974); *Johnson Constr. Co. v. Noble*, 257 Ark. 957, 521 S.W.2d 63 (1975); *Henderson State Univ. v. Haynie*, 269 Ark. 721, 600 S.W.2d 454 (1980); *Bemberg Iron Work v. Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984); *Electro-Air v. Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985).

Claimant not entitled to maximum weekly compensation benefits in absence of no substantial evidence as to weekly pay or that his earning capacity was decreased beyond the partial disability compensation awarded him. *Blann v. Harvill-Byrd Elec. Co.*, 249 Ark. 456, 459 S.W.2d 567 (1970).

If claimant is totally incapacitated to earn in the same or any other employment the wages he was receiving at the time of his injury, then he is entitled to receive weekly benefits during the continuance of

such total disability. *Sunbeam Corp. v. Bates*, 271 Ark. App. 385, 609 S.W.2d 102 (1980).

Claimant entitled to compensation for total disability until the disability ended. *Sunbeam Corp. v. Bates*, 271 Ark. App. 385, 609 S.W.2d 102 (1980).

Where the claimant sustained a hip injury attributable to his broken leg, his problem was not between the hip and the knee, and the hip injury was an injury to the body as a whole. *Milburn v. Concrete Fabricators, Inc.*, 18 Ark. App. 23, 709 S.W.2d 822 (1986).

The word "disability" means loss of earning capacity due to a work-related injury; "impairment" means loss of earning capacity due to a nonwork-related condition; "handicapped" means a physical disability that limits the capacity to work; and "anatomical impairment" means the anatomical loss as reflected by the common usage of medical impairment ratings. *Second Injury Fund v. Yarbrough*, 19 Ark. App. 354, 721 S.W.2d 686 (1986).

Commission may properly take a claimant's refusal to pursue rehabilitation into account in determining his degree of disability where that refusal hinders the commission's attempts to assess the extent of disability. Where the commission did not consider the claimant's failure to request rehabilitation analysis to be an impediment to its determination of permanent total disability, which it found based upon his physical injury, his age, his second-grade education, and his unskilled manual labor experience, the commission was not required to consider claimant's failure to request rehabilitation in determining the degree of his disability. *Second Injury Fund v. Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987).

Where an employee's disability had been worsened by her diabetes and obesity, which in turn had been exacerbated by the failure to follow diets prescribed for her, there was no evidence to support the Workers' Compensation Commission's conclusions that the employee's disability would be less than total were it not for the flare up of her diabetic condition, and no substantial basis for the commission's conclusion that she failed to prove entitlement. *Weller v. Darling Store Fixtures*, 38 Ark. App. 95, 828 S.W.2d 858 (1992).

Temporary total disability healing period ends when the employee is as far

restored as the permanent nature of the injury will permit; if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. *Searcy Indus. Laundry, Inc. v. Ferren*, 92 Ark. App. 65, 211 S.W.3d 11 (2005).

Arkansas Workers' Compensation Commission's analysis of temporary total disability for a back injury was flawed as it was based on the fact that none of the procedures after October 29, 2003, were successful in treating the condition, rather than deciding the issue on the medical evidence that was presented, which showed that employee remained within his healing period and was being treated with the goal of improving his medical condition. *Johnson v. Latex Constr. Co.*, 94 Ark. App. 431, 232 S.W.3d 504 (2006).

—Permanent.

Evidence held sufficient to support finding of total permanent disability. *Peerless Coal Co. v. Gordon*, 237 Ark. 152, 372 S.W.2d 240 (1963); *Arkansas Best Freight Sys. v. Brooks*, 244 Ark. 191, 424 S.W.2d 377 (1968); *Meadowlake Nursing Home v. Sullivan*, 253 Ark. 403, 486 S.W.2d 82 (1972); *M.D. Thompson & Son Co. v. McCuan*, 255 Ark. 762, 502 S.W.2d 93 (1973); *Cooper Indus. Prods., Inc. v. Worth*, 256 Ark. 394, 508 S.W.2d 59 (1974); *Johnson Constr. Co. v. Noble*, 257 Ark. 957, 521 S.W.2d 63 (1975); *Aluminum Co. of America v. Wilson*, 262 Ark. 602, 559 S.W.2d 710 (1978); *Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978); *Revere Copper & Brass, Inc. v. Birdsong*, 267 Ark. 922, 593 S.W.2d 54 (1979); *Henderson v. Winchester*, 268 Ark. 710, 594 S.W.2d 866 (Ct. App. 1980); *Henderson State Univ. v. Haynie*, 269 Ark. 721, 600 S.W.2d 454 (1980); *Benton Serv. Ctr. v. Pinegar*, 269 Ark. 768, 601 S.W.2d 227 (1980); *Halstead Indus. v. Jones*, 270 Ark. 85, 603 S.W.2d 456 (Ct. App. 1980); *Massey Ferguson, Inc. v. Flenoy*, 270 Ark. 126, 603 S.W.2d 463 (1980); *Second Injury Fund v. Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987).

Evidence held insufficient to support finding of total permanent disability. *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *King v. Farmers Liquid Fertilizer*, 267 Ark. 798,

590 S.W.2d 327 (Ct. App. 1979); *Hassen v. Wickes Lumber Co.*, 270 Ark. 922, 606 S.W.2d 611 (1980); *Bradley v. Alumax*, 50 Ark. App. 13, 899 S.W.2d 850 (1995).

The question of permanent total disability is an issue of fact and all relevant evidence bearing upon the issue should be considered by the commission. *Revere Copper & Brass, Inc. v. Birdsong*, 267 Ark. 922, 593 S.W.2d 54 (1979).

Opinion of treating physician in workers' compensation proceeding was not objectionable because it went beyond functional impairment nor because it embraced an ultimate issue to be decided by the commission. *Revere Copper & Brass, Inc. v. Birdsong*, 267 Ark. 922, 593 S.W.2d 54 (1979).

Evidence supported finding that claimant was not permanently totally disabled. *Smelser v. S.H. & J. Drilling Corp.*, 267 Ark. 996, 593 S.W.2d 61 (Ct. App. 1980).

Although the commission's knowledge and experience is not evidence, once it has before it firm medical evidence of physical impairment and functional limitations, it has the advantage of its own superior knowledge of industrial demands, limitations and requirements and can apply its knowledge and experience in weighing the medical evidence of functional limitations together with other evidence of the manner in which the functional disability will affect the ability of an injured employee to obtain or hold a job, and thereby arrive at a reasonably accurate conclusion as to the extent of permanent partial disability as related to the body as a whole. *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

The Workers' Compensation Commission is required to consider factors other than mere physical disability in making an award of permanent total disability. Thus, where the physicians assessed the claimant's physical impairment at only 5-10% disability, but the commission found 30% disability, the commission must have considered the claimant's age, education, and training, and since its determination was supported by the evidence, the commission did not err in finding that the claimant was not totally disabled. *Johnson v. Research-Cottrell*, 15 Ark. App. 48, 689 S.W.2d 8 (1985).

There was sufficient evidence to support the Workers' Compensation Commission's award of permanent disability benefits of

70% to the body as a whole, where the medical expert concurred that the employee could return to work but also agreed that he should curtail activities involving lifting, bending, and twisting his back, and his employment potential lay in work settings that would not require sustained physical exertion that might expose his back to new injury. *Del Monte Frozen Foods, Inc. v. Harmon*, 19 Ark. App. 51, 716 S.W.2d 784 (1986).

Where employee's present tears identified in his disc were the product of aging, which was predicated upon a natural consequence growing from a compensable injury, the employee was still permanently and totally disabled. *Jim Walter Homes v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

No substantial evidence supported the Arkansas Workers' Compensation Commission's conclusion that an employee, who suffered a fifty-percent impairment to his left lower extremity and a scheduled compensable injury to his right leg, was not permanently and totally disabled under § 11-9-519(b) when the Commission relied on a vocational rehabilitation counselor's report about available jobs but the counselor testified that her assessment of available jobs was produced before the psychological and psychiatric reports were made. The Commission ignored the psychological and psychiatric reports, which corroborated the employee's testimony that he was functionally illiterate and which assessed further limitations on his ability to work. *McDonald v. Batesville Poultry Equip.*, 90 Ark. App. 435, 206 S.W.3d 908 (2005).

—Temporary.

Claimant held entitled to temporary total disability benefits. *International Paper Co. v. McGoogan*, 255 Ark. 1025, 504 S.W.2d 739 (1974); *Conway Convalescent Ctr. v. Murphree*, 266 Ark. 985, 588 S.W.2d 462 (Ct. App. 1979); *Desoto, Inc. v. Parsons*, 267 Ark. 665, 590 S.W.2d 51 (Ct. App. 1979); *Pyles v. Triple F. Feeds of Texas, Inc.*, 270 Ark. 729, 606 S.W.2d 146 (Ct. App. 1980); *Sanyo Mfg. Corp. v. Farrell*, 16 Ark. App. 59, 696 S.W.2d 779 (1985); *Chamber Door Indus., Inc. v. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997).

Claimant was not entitled to additional compensation for temporary total disability.

ity. *Wise v. Deltic Farm & Timber Co.*, 269 Ark. 881, 601 S.W.2d 580 (Ct. App. 1980).

Claimant held not entitled to temporary total disability benefits after healing period ended. *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (1980); *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982), superseded by statute as stated in, *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984) (decided under prior law) *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

There was substantial evidence to support finding that claimant was not temporarily totally disabled. *Green v. Jacuzzi Bros.*, 269 Ark. 733, 600 S.W.2d 448 (Ct. App. 1980).

If during the period while the body is healing, the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total. *Pyles v. Triple F. Feeds of Texas, Inc.*, 270 Ark. 729, 606 S.W.2d 146 (Ct. App. 1980).

Temporary disability is a separate and distinct disability from any permanent disability and may be compensated separately. *Arkansas State Hwy. & Transp. Dep't v. Breshears*, 271 Ark. 398, 609 S.W.2d 81 (1980), modified, *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (Ark. 1981).

Temporary total disability and the healing period in workers' compensation cases are not the same time periods in all cases since temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages under subdivision (5) of § 11-9-102 and this section. *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (Ark. 1981).

Where the employee's claim was originally brought against both the employer and the Second Injury Fund for temporary total disability and medical benefits, the Second Injury Fund was dismissed as a party, and the employee filed his pro se notice of appeal as to the Second Injury Fund only, the appeal was properly dismissed because the employee failed to properly make the employer a party on appeal and the Second Injury Fund was no longer a party. *Garland v. Windsor*

Door, 19 Ark. App. 284, 719 S.W.2d 714 (1986).

The Workers' Compensation Law does not authorize award of current total or limited total disability benefits after the end of the healing period. The concept of current total disability benefits seems to have been based on *McNeely v. Clem Mill & Gin Co.*, 241 Ark. 498, 409 S.W.2d 502 (1966); to the extent that *McNeely* has been interpreted as holding that temporary benefits, regardless of how they are denominated, may be paid after the end of the healing period, that interpretation is erroneous. *Arkansas Secretary of State v. Guffey*, 291 Ark. 624, 727 S.W.2d 826 (1987).

Recurring symptoms may give rise to a subsequent healing period after the original one has ended. Where a second complication is found to be a natural and probable result of the first injury, the employer remains liable, and this liability includes liability for additional temporary benefits when the employee undergoes a second, distinct healing period. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

In cases controlled by this section, temporary total disability is not based on the claimant's healing period, but is awarded where the claimant's injury-caused incapacity prevents him from earning the wages he was receiving at the time of the injury. *County Mkt. v. Thornton*, 27 Ark. App. 235, 770 S.W.2d 156 (1989), rehearing denied, *County Market v. Thornton*, 27 Ark. App. 235, 771 S.W.2d 793 (1989).

Claimant was not entitled to temporary total disability benefits where he failed to prove a compensable, work-related injury. *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989).

Medical records clearly supported commission's findings that claimant was entitled to temporary total disability benefits for an injury to her back and legs in July 1991 that rendered her unable to return to work until November 1991. *W.W.C. Bingo v. Zwierzynski*, 53 Ark. App. 288, 921 S.W.2d 954 (1996).

If the underlying condition causing disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period for which an employee is entitled to temporary total disability benefits is

ended. *Roberson v. Waste Mgt.*, 58 Ark. App. 11, 944 S.W.2d 858 (1997).

Evidence.

Arkansas Workers' Compensation Commission did not err in awarding temporary total disability benefits to employee for a cervical spine injury after she had injured her back as the finding that employee's healing period had not ended was supported by substantial evidence. *Searcy Indus. Laundry, Inc. v. Ferren*, 92 Ark. App. 65, 211 S.W.3d 11 (2005).

Where appellant employee reported that he sustained a second back injury at work, two MRIs indicated that there were no new objective findings and the record contained competing opinions between physicians. The Arkansas Workers' Compensation Commission chose to credit those which indicated that there were no objective findings of injury; the Commission's decision denying medical and temporary-total disability benefits was supported by substantial evidence. *Lamb v. Norac Co.*, 2009 Ark. App. 730, — S.W.3d — (2009).

Arkansas Workers' Compensation Commission had a substantial basis upon which to deny a claim for additional medical and temporary-total disability benefits because the workers' compensation benefits claimant underwent two MRIs, and there were new objective findings on the second MRI, according to the radiologist who reviewed both MRIs, and the doctor related claimant's need for treatment to the new injury; the Commission, reviewing the evidence de novo, found that no causal connection between the primary injury and the subsequent disability was shown, eliminating the need to address claimant's conduct. *Griffith v. Medcath, Inc.*, 2009 Ark. App. 777, — S.W.3d — (2009).

This section did not require for a permanent-total-disability (PTD) determination, that a workers' compensation claimant have an impairment rating established by the medical evidence because the statute's plain language contained no such requirement. Thus, the court overruled its decision in *Wren v. Sanders Plumbing Supply*, 83 Ark. App. 111, 117 S.W.3d 657 (2003), to the extent that the decision held that without an impairment rating, a claimant was not entitled to permanent disability benefits

or wage-loss benefits. *Rutherford v. Mid-Delta Cmty. Servs.*, 102 Ark. App. 317, 285 S.W.3d 248 (2008), review denied, *Rutherford v. Mid-Delta Cmty. Servs., Inc.*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 507 (Jan. 30, 2009).

Denial of permanent-total disability benefits to the employee was appropriate pursuant to subdivisions (e)(1) and (2) of this section because all of her physicians had returned her to work full-duty with no restrictions and no medical provider indicated that she was unable to work. *Greenfield v. Conagra Foods, Inc.*, 2010 Ark. App. 292, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 468 (May 19, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 440 (Sept. 23, 2010).

Substantial evidence supported the denial of permanent total disability, as there was evidence of record that a claimant had transferrable work skills, motivation, and the ability to do some sedentary work. *Hixon v. Baptist Health*, 2010 Ark. App. 414, — S.W.3d — (2010).

Arkansas Workers' Compensation Commission did not err in denying an employee's claim for permanent total disability benefits under subdivision (e)(1) of this section for carpal-tunnel syndrome because the Commission relied on both a functional capacity evaluation, which showed that the employee could do sedentary work, and the employee's college education; the employee could read, write, drive as needed, and perform limited household chores. *Kirkendolph v. Dep't of Fin. & Admin.*, 2010 Ark. App. 786, — S.W.3d — (2010).

Finding that the cashier was not permanently and totally disabled under subdivision (e)(1) of this section and was not entitled to an ultrasound recommended by her physician was appropriate because the Arkansas Workers' Compensation Commission was permitted to determine the credibility of witnesses and the weight to be given their testimony. Regarding the ultrasound, it was within the province of the Commission to choose to attribute greater weight and credibility to the opinions of one doctor over another. *Hruska v. Baxter Reg'l Med. Ctr.*, 2011 Ark. App. 599, — S.W.3d — (2011).

Hernia.

Where an employee has had good results from a hernia operation and where

his total disability results from his susceptibility to the recurrence of the hernia, he is not entitled to benefits for total disability, but is limited to the benefits provided by the hernia provision in § 11-9-523. *Smith v. Riceland Food*, 261 Ark. 10, 545 S.W.2d 604 (1977).

Partial Disability.

Partial disability decision by the Arkansas Workers' Compensation Commission was affirmed for a worker with extremely limited job prospects due to limited education, poor English-speaking ability, and medical restrictions. The worker could not claim permanent and total disability as long as she could earn wages in even a very limited capacity. *Khampane v. Rheem Mfg. Co.*, 2011 Ark. App. 299, — S.W.3d — (2011).

Wage Earning Loss.

The wage-loss factor rather than the functional or anatomical loss is controlling in disability determinations which are to be made by the commission on the basis of medical evidence, age, education, experience and other matters reasonably expected to affect the claimant's earning power. *Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985).

A worker may be entitled to additional wage loss disability even though his wages remain the same or increase after the injury. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

Claimant was within the odd-lot category of workers. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993).

Given that, in scheduled injury cases, the nature of the injury is fixed, the finding of permanent and total disability under such circumstances necessarily hinges on factors which bear on the claimant's age, education, experience, and other matters affecting wage loss. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993).

Employers are on notice that an employee with a scheduled injury who claims to be permanently and totally disabled will necessarily be presenting proof of wage-loss factors such a mental capacity, education, training, or age, and that a

sufficient showing by the claimant will require that the employer show that suitable work is available on a regular and continuous basis; therefore, employer who knew that employee was making a claim for total and permanent disability prior to a hearing was on notice that the odd-lot doctrine was at issue. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993).

In determining benefits for a claimant who was employed by two employers in the capacity of a joint employee and who was only working one forty-hour work week, although employee was receiving a check from both employers for the same work week, the commission concluded that claimant was entitled to idemnity benefits based upon his combined wages. *Cook v. Recovery Corp.*, 50 Ark. App. 49, 900 S.W.2d 212 (1995), *aff'd*, 322 Ark. 707, 911 S.W.2d 581 (1995).

Arkansas Court of Appeals, Division Four, holds that a claimant with a scheduled injury is not entitled to permanent partial disability benefits, and this applies whether the claimant is seeking benefits from an employer, an insurer, or the Arkansas Second Injury Fund. Therefore, a claimant, who lost four fingers in an accident, was unable to obtain wage-loss disability over and above the impairment rating to her hand based on a previous diagnosis of foot ulcers, even if the Fund was liable. *Crelia v. Rheem Mfg. Co.*, 99 Ark. App. 73, 257 S.W.3d 115 (2007).

There was no substantial evidence to support the conclusion of the Workers' Compensation Commission that an employee suffered only a 20 percent reduction in earning capacity because the evidence demonstrated that the employee sustained more than a 20 percent wage loss when comparing the wages paid for a press operator job and the subsequent light work the employer offered. *Tucker v. Cooper Std. Auto., Inc.*, 2010 Ark. App. 7, — S.W.3d — (2010).

Cited: *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Abbott v. C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968); *C. Finkbeiner, Inc. v. Flowers*, 251 Ark. 241, 471 S.W.2d 772 (1971); *Bibler Bros. Lumber Co. v. Allen*, 251 Ark. 593, 474 S.W.2d 116 (1971); *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408

(1971); *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978); *Browning's Restaurant v. Kuykendall*, 263 Ark. 374, 565 S.W.2d 33 (1978); *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Hammer v. Intermed N.W.*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (1980); *Midwest Steel Co. v. Mulanax*, 270 Ark. 914, 606 S.W.2d 606 (1980); *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251,

629 S.W.2d 320 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984); *C.J. Horner Co. v. Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *General Indus. v. Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987); *Brown v. Dow Chem. Co.*, 875 F.2d 197 (8th Cir. 1989); *Death & Permanent Total Disability Trust Fund v. Hempstead County*, 32 Ark. App. 36, 796 S.W.2d 351 (1990).

11-9-520. Compensation for disability — Temporary partial disability.

In case of temporary partial disability resulting in the decrease of the injured employee's average weekly wage, there shall be paid to the employee sixty-six and two-thirds percent (66 $\frac{2}{3}$ %) of the difference between the employee's average weekly wage prior to the accident and his or her wage-earning capacity after the injury.

History. Init. Meas. 1948, No. 4, § 13, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 2, Acts 1957; Acts 1975 (Extended Sess., 1976), No. 1227, § 8; A.S.A. 1947, § 81-1313; reen. Acts 1987, No. 1015, § 8.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 1015, § 8. Acts

1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

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In General.

Temporary disability is a separate and distinct disability from any permanent disability and may be compensated separately. *Arkansas State Hwy. & Transp. Dep't v. Breshears*, 271 Ark. 398, 609 S.W.2d 81 (1980), modified, *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (Ark. 1981).

Award.

Award of compensation for temporary partial disability based on employee's wages at the time of the injury was improper where there was proof of some work and earnings by the employee after the injury. *Long-Bell Lumber Co. v. Mitchell*, 206 Ark. 854, 177 S.W.2d 920 (1944).

Evidence sufficient to support compensation award. *Great Am. Indem. Co. v. Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953).

If claimant would have been able to work longer if his injuries had not occurred he is entitled to compensation award. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

Evidence sufficient to support denial of compensation award. *Williams v. Arkan-*

sas Oak Flooring Co., 267 Ark. 810, 590 S.W.2d 328 (Ct. App. 1979).

Where the claimant sustained a compensable injury while working at one job, his compensation benefits were properly based on wages from that job rather than on the combined incomes of that job and a second job held by claimant. *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980).

Definitions.

The term temporary partial disability refers to the phase of permanent partial disability where the employee, although able to work at some gainful occupation, is still suffering from the effects of the injury, which effects may reasonably be anticipated to disappear within the time fixed for compensation. *Anchor Constr. Co. v. Rice*, 252 Ark. 460, 479 S.W.2d 573 (1972).

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages while temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. *Arkansas State Highway & Transp. Dep't v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (Ark. 1981).

Denial of Benefits.

Workers' compensation commission did not err in affirming the denial of additional benefits for lower back injuries the claimant claimed were caused by a 1998 work-related foot accident because, *inter alia*, the claimant had been in a motor vehicle accident in 1999 and, two-and-one-half years after his injury an emergency room report indicated that the claimant's back pain and history of complaints had begun just two weeks earlier. *Murphy v. Forsgren, Inc.*, 99 Ark. App. 223, 258 S.W.3d 794 (2007).

Workers' compensation commission did not err in finding that the claimant failed to prove that his depression was a result of his compensable right-foot injury in 1998 because the claimant's psychological complaints did not appear in medical records until 2002 a clinic note of February 21, 2001 stated that the claimant did not suffer from psychological problems, and on September 4, 2001, the doctor assigned

the claimant a permanent physical impairment rating and stated that he had reached maximum medical improvement. *Murphy v. Forsgren, Inc.*, 99 Ark. App. 223, 258 S.W.3d 794 (2007).

Workers' compensation commission did not err in finding that the claimant failed to prove that a pain pump recommended by his treating physician was reasonably necessary for treatment of his compensable injuries; the commission pointed to the claimant's testimony that he was not sure whether he even wanted the pain pump, and it found that he had failed to prove that the pump was for treatment of the 1998 compensable work-related injury to his right lower extremity. *Murphy v. Forsgren, Inc.*, 99 Ark. App. 223, 258 S.W.3d 794 (2007).

Workers' compensation commission did not err in affirming the denial of additional benefits for the period from January 28, 2002, until an undetermined date because a doctor's report of September 4, 2001 stated that the claimant had reached maximum medical improvement for his compensable right-foot injury in 1998, and there was no indication subsequent to that date that he re-entered his healing period or suffered a total incapacity to earn wages as a result of the injury. *Murphy v. Forsgren, Inc.*, 99 Ark. App. 223, 258 S.W.3d 794 (2007).

Substantial evidence supported the Arkansas Workers' Compensation Commission's decision to deny an employee temporary-partial-disability benefits and temporary-total-disability benefits because the employer paid the employee temporary-total-disability benefits through December 31, 2007, and a doctor concluded that the employee had reached maximum medical improvement on November 1, 2007; relying on the doctor's opinion, the Commission found that the employee was not entitled to any further temporary-disability benefits beyond November 1, 2007, and the doctor's provided substantial support for the Commission's decision. *Adams v. Bemis Co.*, 2010 Ark. App. 859, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 35 (Jan. 19, 2011).

Judicial Bias.

Workers' compensation claimant's separation of powers argument failed because he did not show that the administrative

law judge (ALJ) who decided his case was under pressure or biased in anyway against the claimant because, inter alia, he failed to establish that the ALJ who heard his case was subject to the pressures that had allegedly been exerted by the executive branch against law judges at an earlier time. *Murphy v. Forsgren, Inc.*, 99 Ark. App. 223, 258 S.W.3d 794 (2007).

Refusal.

This section contemplates a situation in which an employee returns to work but, because of a temporary-partial disability, is not earning the same wages as before the injury; where § 11-9-526 bars a claimant from receiving temporary-total-disability benefits for a designated period of time because of a refusal to accept suitable employment that is within the claimant's capacity to perform, the same rationale applies to bar the claimant from receiving temporary-partial disability. Therefore, in a case where a claimant refused to accept work within her capability at a medical clinic or in a laundry room after she suffered a compensable shoulder and neck injury, she was unable to receive temporary-partial disability. *Neal v. Sparks Reg'l Med. Ctr.*, 104 Ark. App. 97, 289 S.W.3d 163 (2008).

Wage Earning Loss.

The wage-loss factor rather than the functional or anatomical loss is controlling in disability determinations which are to be made by the commission on the basis of medical evidence, age, education, experience and other matters reasonably expected to affect the claimant's earning power. *Rooney v. Charles*, 262 Ark. 695,

560 S.W.2d 797 (1978); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985).

A worker may be entitled to additional wage loss disability even though his wages remain the same or increase after the injury. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

Cited: *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Abbott v. C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968); *Bibler Bros. Lumber Co. v. Allen*, 251 Ark. 593, 474 S.W.2d 116 (1971); *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971); *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978); *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Hammer v. Intermed N.W.*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (1980); *Midwest Steel Co. v. Mulanax*, 270 Ark. 914, 606 S.W.2d 606 (1980); *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984); *C.J. Horner Co. v. Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *General Indus. v. Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987).

11-9-521. Compensation for disability — Scheduled permanent injuries.

(a) An employee who sustains a permanent compensable injury scheduled in this section shall receive, in addition to compensation for temporary total and temporary partial benefits during the healing period or until the employee returns to work, whichever occurs first, weekly benefits in the amount of the permanent partial disability rate attributable to the injury, for that period of time set out in the following schedule:

(1) Arm amputated at the elbow, or between the elbow and shoulder, two hundred forty-four (244) weeks;

(2) Arm amputated between the elbow and wrist, one hundred eighty-three (183) weeks;

(3) Leg amputated at the knee, or between the knee and the hip, one hundred eighty-four (184) weeks;

(4) Leg amputated between the knee and the ankle, one hundred thirty-one (131) weeks;

(5) Hand amputated, one hundred eighty-three (183) weeks;

(6) Thumb amputated, seventy-three (73) weeks;

(7) First finger amputated, forty-three (43) weeks;

(8) Second finger amputated, thirty-seven (37) weeks;

(9) Third finger amputated, twenty-four (24) weeks;

(10) Fourth finger amputated, nineteen (19) weeks;

(11) Foot amputated, one hundred thirty-one (131) weeks;

(12) Great toe amputated, thirty-two (32) weeks;

(13) Toe other than great toe amputated, eleven (11) weeks;

(14) Eye enucleated, in which there was useful vision, one hundred five (105) weeks;

(15) Loss of hearing of one ear, forty-two (42) weeks;

(16) Loss of hearing of both ears, one hundred fifty-eight (158) weeks; and

(17) Loss of one testicle, fifty-three (53) weeks; loss of both testicles, one hundred fifty-eight (158) weeks.

(b)(1) Compensation for amputation of the first phalange shall be one-half ($\frac{1}{2}$) of the compensation for the amputation of the entire digit.

(2) Compensation for amputation of more than one (1) phalange of a digit shall be the same as for amputation of the entire digit.

(c)(1) Compensation for the permanent loss of eighty percent (80%) or more of the vision of an eye shall be the same as for the loss of an eye.

(2) In all cases of permanent loss of vision, the use of corrective lenses may be taken into consideration in evaluating the extent of loss of vision.

(d) Compensation for amputation or loss of use of two (2) or more digits or one (1) or more phalanges of two (2) or more digits of a hand or a foot may be proportioned to the total loss of use of the hand or the foot occasioned thereby but shall not exceed the compensation for total loss of a hand or a foot.

(e) Compensation for permanent total loss of use of a member shall be the same as for amputation of the member.

(f) Compensation for permanent partial loss or loss of use of a member shall be for the proportionate loss or loss of use of the member.

(g) Any employee suffering a scheduled injury shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment set forth above except as otherwise provided in § 11-9-519(b).

(h)(1)(A) The Workers' Compensation Commission, after a public hearing, shall adopt an impairment rating guide to be used in the assessment of anatomical impairment.

(B) The guide shall not include pain as a basis for impairment.

(2) The impairment rating guide adopted by the commission shall be subject to review by the General Assembly before April 1 of every odd-numbered year beginning with the regular session of 1999.

History. Init. Meas. 1948, No. 4, § 13, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 2, Acts 1957; Acts 1975 (Extended Sess., 1976), No. 1227, § 8; 1986 (2nd Ex. Sess.), No. 10, § 5; A.S.A. 1947, § 81-1313; reen. Acts 1987, No. 1015, § 8; Acts 1993, No. 796, § 23; 1997, No. 251, § 2; 1997, No. 260, § 2.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 1015, § 8. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any

other 1987 legislation and that such other legislation would be controlling in the event of conflict.

As enacted, subdivision (h)(1)(A) began: "On or before July 1, 1994."

Acts 2001, No. 1757, § 9, provided, in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

Ark. L. Rev. Workmen's Compensation — Scheduled Benefits as a Minimum Recovery, 21 Ark. L. Rev. 244.

Workmen's Compensation — Schedule Loss of Use, 27 Ark. L. Rev. 132.

CASE NOTES

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In General.

Scheduled injuries differ from unscheduled injuries in that the award for a scheduled injury generally is limited to the benefits provided for that particular scheduled injury. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993).

An employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during his healing period or until he returns

to work, regardless of whether he has demonstrated that he is actually incapacitated from earning wages. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

Benefits.

An award of a 20 percent wage-loss disability, with the Second Injury Fund to pay half, was proper following a 1995 injury which itself resulted in an impairment rating of only 2 percent. *Second Injury Fund v. Stephens*, 62 Ark. App. 255, 970 S.W.2d 331 (1998).

Claimant was entitled to temporary disability benefits as claimant showed he sustained a scheduled injury, was in a "healing period" even though his doctor did not use that precise term, and should not be penalized for staying on the job and working through the pain after the employer refused to provide medical treatment for his leg injury sustained on the job, as the claimant did not "return to work" in such a way that benefits should be terminated. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Workers' compensation claimant was not statutorily barred from receiving temporary total or partial disability, under this section, because he undisputedly re-

maintained in his healing period and continued to work light duty and because there was no substantial evidence of unjustifiable refusal to work, such that § 11-9-526 would have been triggered. *Walker v. Cooper Auto.*, — Ark. App. —, 289 S.W.3d 184 (2008).

Pursuant to § 11-9-526, an employee with a knee injury who refused light duty work offered to him by his employer following surgery on the knee was not entitled to temporary total disability (TTD) benefits because, under subsection (a) of this section, the failure to return to work must have been causally related to the injury. *Gomez v. Crossland Constr. Co.*, 2011 Ark. App. 787, — S.W.3d — (2011).

Compensation.

Claimants held entitled to compensation. *Great Am. Indem. Co. v. Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953); *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

The term compensation as used in this section refers to money benefits paid to the injured employee for disability. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Where the claimant sustained a compensable injury while working at one job, his compensation benefits were properly based on wages from that job rather than on the combined incomes of that job and another job held by claimant. *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980).

Although a scheduled injury cannot be apportioned to the body as a whole absent total disability, a claimant who has received a scheduled injury can receive additional compensation for an injury which is found to be attributable to the scheduled injury. *Milburn v. Concrete Fabricators, Inc.*, 18 Ark. App. 23, 709 S.W.2d 822 (1986).

For a scheduled injury, absent a finding of permanent total disability, the award is limited to the benefits provided for that scheduled injury. *Rash v. Goodyear Tire & Rubber Co.*, 18 Ark. App. 248, 715 S.W.2d 449 (1986).

Compensation for an injury scheduled in this section is payable to the injured worker without regard to subsequent earning capacity; these benefits are awarded more in the nature of an indemnity for physical or functional loss and are

payable whether the worker is employed or unemployed and irrespective of what his wages or earning capacity may be. *Rash v. Goodyear Tire & Rubber Co.*, 18 Ark. App. 248, 715 S.W.2d 449 (1986).

Arkansas Workers' Compensation Commission erred in overturning an award of temporary total disability benefits where, due to the fact that employee suffered from a scheduled injury, she was not required to show that she was totally incapacitated from working, only that she had not returned to work because she remained in her healing period. *Fendley v. Pea Ridge Sch. Dist.*, 97 Ark. App. 214, 245 S.W.3d 676 (2006).

Evidence.

Where medical testimony fixed functional loss of use at 10 percent, claimant's testimony could not be used by the commission as basis for increasing the percentage of functional loss from 10 percent to 35 percent. *Springdale Farms v. McGarrah*, 260 Ark. 483, 541 S.W.2d 928 (1976).

Award held to be supported by substantial evidence. *Ellis v. Clayton Shoe Co.*, 267 Ark. 882, 595 S.W.2d 229 (Ct. App. 1979).

Substantial evidence supported the Workers' Compensation Commission's finding that the employee had not returned to work; the employee repeatedly attempted to work and repeatedly required additional care and treatment and specific medical evidence indicated that her continued treatment for the compensable injury was required past the date of her termination by the employer. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

Arkansas Workers' Compensation Commission's finding on permanent impairment was supported by substantial evidence as the claimant's treating physician found he had an 88% impairment under the American Medical Association Guides, and the claimant testified that he did have some functional use of his left arm. *Main v. McGehee Metals*, 2010 Ark. App. 585, — S.W.3d — (2010).

Eye injuries.

Partial permanent impairments to the eyes come within the scheduled injury category as set out in subsection (f); claimants are limited to the scheduled benefits, and such benefits cannot be increased by

considering wage-loss factors absent a finding of permanent total disability. *Federal Compress & Whse. Co. v. Risper*, 55 Ark. App. 300, 935 S.W.2d 279 (1996).

Injuries.

Although the Arkansas Workers' Compensation Commission is authorized pursuant to subsection (h) of this section to adopt an impairment rating guide to be used in the assessment of anatomical impairment, the Commission has no authority to adopt a guide that changes the definition of compensable injury as established by the legislature and interpreted by the Arkansas judiciary. *Singleton v. City of Pine Bluff*, 102 Ark. App. 305, 285 S.W.3d 253 (2008).

—In General.

Permanent injuries reduced to a scheduled injury. *Anchor Constr. Co. v. Rice*, 252 Ark. 460, 479 S.W.2d 573 (1972).

Where worker suffered a compensable injury, he could not recover benefits for permanent disability for this loss since it was not a scheduled injury under this section nor could he recover for the loss through a common law tort action since the injury was compensable under this chapter. *Moss v. Southern Excavation, Inc.*, 271 Ark. 781, 611 S.W.2d 178 (1981).

—Apportionment to Body.

Permanent partial impairment resulting from two successive injuries were scheduled injuries under this section and were not subject to apportionment to the body as a whole under § 11-9-522. *Moyers Bros. v. Poe*, 249 Ark. 984, 462 S.W.2d 862 (1971).

A scheduled injury could not be apportioned to the body as a whole in determining the extent of permanent partial disability as distinguished from permanent total disability. *Anchor Constr. Co. v. Rice*, 252 Ark. 460, 479 S.W.2d 573 (1972).

Where effect of foot amputation was continuing aggravation of back condition and five percent permanent partial disability to back, the Workers' Compensation Commission did not err in not apportioning the combined effect of amputation and back injury to the body as a whole. *Clark v. Shiloh Tank & Erection Co.*, 259 Ark. 521, 534 S.W.2d 240 (1976).

The test of whether a claimant's shoulder injury falls within this section is primarily a question of law; claimant's shoul-

der impairment was clearly : an unscheduled injury which should have been apportioned to the body as a whole pursuant to § 11-9-522. *Taylor v. Pfeiffer Plumbing & Heating Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983).

Courts must adhere to legislative decision to adopt rigid rule that absent a showing of total disability a scheduled injury cannot be apportioned to the body as a whole; accordingly, commission did not err in refusing to reopen record to receive additional evidence concerning degree to which foot injury caused disability to body as a whole. *Hill v. White-Rodgers*, 10 Ark. App. 402, 665 S.W.2d 292 (1984).

—Hand Injury.

Compensation for permanent partial impairment of hand may be paid regardless of income. *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952).

Claimant entitled to payment of amount awarded by board for permanent partial impairment for hand injury even though employer had previously paid him more than the amount. *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952).

For 5% permanent partial disability to his right hand, a worker was entitled to the maximum weekly compensation for 5% of the number of weeks allowable for loss of a hand rather than 5% of the maximum weekly compensation for the number of weeks allowable for the loss of a hand. *Industrial Coatings of Beaumont v. Heath*, 249 Ark. 909, 462 S.W.2d 450 (1971).

Where a Workers' Compensation Commission's rule provides that: the loss by amputation of half or less than half of the terminal phalange of a member shall be one-half of the loss of the phalange, or one-fourth of the digit; that the loss of more than one-half of the terminal phalange of a member shall constitute loss of the phalange, or one-half of the finger; and that ordinarily the base of the nail may be used as a gauge of half the phalange, the rule is not in conflict with subsection (b), but simply amplifies it. *Ellis v. Clayton Shoe Co.*, 267 Ark. 882, 595 S.W.2d 229 (Ct. App. 1979).

—Hearing Loss.

Employee's workers' compensation claim was within the two-year period set forth in § 11-9-702 because the employ-

ee's hearing loss stabilized in 2001 when he retired and was no longer exposed to occupational noise and thus, his claim in July 2002 was within the required time-frame. The statute of limitations did not begin to run until a scheduled injury was permanent and a rating could be attributed to the injury. *Powers v. City of Fayetteville*, 97 Ark. App. 251, 248 S.W.3d 516 (2007).

—Heart Attack.

A heart attack is compensable only if there is a causal connection between the heart attack and one's employment; and when it is established that the employee was putting forth unusual exertion at the time of the heart attack it is ordinarily held that the requirement of causal connection has been met. *Beeson v. Land-coast*, 43 Ark. App. 132, 862 S.W.2d 846 (1993).

—Leg Injury.

Award of compensation to injured worker was proper. *Caddo Quicksilver Corp. v. Barber*, 204 Ark. 985, 166 S.W.2d 1 (1942) (decision under prior law).

—Vision Loss.

Trial court properly reversed the commission's award where cumulative vision loss was greater than the amount awarded. *Emerson Elec. Co. v. Powers*, 268 Ark. 920, 597 S.W.2d 111 (Ct. App. 1980).

The benefits for scheduled injuries are not limited to the schedule if the injury renders the employee permanently and totally disabled, and court did not err in ordering vocational rehabilitation examination for claimant who suffered vision loss. *Hampton & Crain v. Black*, 34 Ark. App. 77, 806 S.W.2d 21 (1991).

Claimant held not to have sustained any permanent disability to his vision, since under this section the use of corrective lenses may be taken into consideration in evaluating the extent of loss of vision, and an examining physician stated that the claimant's corrected vision was normal. *Barnard v. B & M Constr.*, 52 Ark. App. 61, 915 S.W.2d 296 (1996).

The issue of permanent disability compensation for decreased visual acuity caused by an irregular corneal astigmatism was properly reserved where the employee's physician had not yet determined the degree of correctable impair-

ment. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998).

Temporary Total Disability.

Arkansas Workers' Compensation Commission properly denied a workers' compensation claimant temporary total disability benefits after the claimant was terminated for insubordination as under subsection (a) of this section, whether the claimant was within the healing period was irrelevant as the claimant had returned to light-duty work. *Robertson v. Pork Group, Inc.*, 2011 Ark. App. 448, — S.W.3d — (2011).

Total Permanent Disability.

Total permanent disability may be paid notwithstanding compensation was received for specific loss under this section. *McNeely v. Clem Mill & Gin Co.*, 241 Ark. 498, 409 S.W.2d 502 (1966); *Cooper Indus. Prods., Inc. v. Worth*, 256 Ark. 394, 508 S.W.2d 59 (1974); *Johnson Constr. Co. v. Noble*, 257 Ark. 957, 521 S.W.2d 63 (1975); *Bemberg Iron Work v. Martin*, 12 Ark. App. 128, 671 S.W.2d 768 (1984); *Electro-Air v. Villines*, 16 Ark. App. 102, 697 S.W.2d 932 (1985).

Arkansas Workers' Compensation Commission erred in interpreting §§ 11-9-521(g) and -519(b) as barring an employee, who suffered a fifty-percent impairment to his left lower extremity, from recovering permanent total disability benefits because he had suffered a scheduled compensable injury to his right leg. In finding that a scheduled-injury claimant was prohibited from entitlement to permanent total disability benefits in excess of the percentage of his physical impairment and that such a claim had to meet the multiple-loss requirements, the Commission impermissibly expanded the statutory prohibition of a claim for permanent partial disability benefits except in a case of multiple losses. *McDonald v. Batesville Poultry Equip.*, 90 Ark. App. 435, 206 S.W.3d 908 (2005).

Wage Earning Loss.

The commission cannot consider a wage earning loss in addition to the functional loss in fixing partial loss or partial loss of use of a limb under this section. *Anchor Constr. Co. v. Rice*, 252 Ark. 460, 479 S.W.2d 573 (1972).

Where an injury scheduled under this section is involved, it is immaterial that

the claimant has suffered no loss of earnings. *International Paper Co. v. Remley*, 256 Ark. 7, 505 S.W.2d 219 (1974).

The wage-loss factor rather than the functional or anatomical loss is controlling in disability determinations which are to be made by the commission on the basis of medical evidence, age, education, experience and other matters reasonably expected to affect the claimant's earning power. *Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985).

The rule in this state is that a claimant sustaining a scheduled injury is limited to the applicable allowances set forth in this section and the benefits cannot be increased by considering wage loss factors absent a finding of permanent total disability. *Taylor v. Pfeiffer Plumbing & Heating Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983).

Given that, in scheduled injury cases, the nature of the injury is fixed, the finding of permanent and total disability under such circumstances necessarily hinges on factors which bear on the claimant's age, education, experience, and other matters affecting wage loss. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993).

Arkansas Court of Appeals, Division Four, holds that a claimant with a scheduled injury is not entitled to permanent partial disability benefits, and this applies whether the claimant is seeking benefits from an employer, an insurer, or the Arkansas Second Injury Fund. Therefore, a claimant, who lost four fingers in an accident, was unable to obtain wage-loss disability over and above the impairment rating to her hand based on a previous diagnosis of foot ulcers, even if the Fund was liable. *Crelia v. Rheem Mfg. Co.*, 99 Ark. App. 73, 257 S.W.3d 115 (2007).

Substantial evidence did not support an award of only 20-percent wage-loss dis-

ability, because at the time of the work-related injury the employee was making \$67,721.07, and the evidence clearly showed that the most the employee would be able to make as a social worker or in one of the sedentary jobs found by the disability insurer was \$35,000 per year, an amount significantly less than the employee's pre-injury earnings. *Taggart v. Mid Am. Packaging*, 2009 Ark. App. 335, 308 S.W.3d 643 (2009).

Cited: *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Abbott v. C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968); *Bibler Bros. Lumber Co. v. Allen*, 251 Ark. 593, 474 S.W.2d 116 (1971); *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971); *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978); *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Hammer v. Intermed N.W.*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (1980); *Midwest Steel Co. v. Mulanax*, 270 Ark. 914, 606 S.W.2d 606 (1980); *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984); *C.J. Horner Co. v. Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *General Indus. v. Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987); *Noggle v. Arkansas Valley Elec. Coop.*, 31 Ark. App. 104, 788 S.W.2d 497 (1990); *Minnesota Mining & Mfg. v. Baker*, 63 Ark. App. 160, 975 S.W.2d 863 (1998); *Kirkendolph v. DF&A Revenue Servs. Div.*, 2009 Ark. App. 629, — S.W.3d — (2009).

11-9-522. Compensation for disability — Unscheduled permanent partial disability.

(a) A permanent partial disability not scheduled in § 11-9-521 shall be apportioned to the body as a whole, which shall have a value of four hundred fifty (450) weeks, and there shall be paid compensation to the

injured employee for the proportionate loss of use of the body as a whole resulting from the injury.

(b)(1) In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Workers' Compensation Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity.

(2) However, so long as an employee, subsequent to his or her injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his or her average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence.

(c)(1) The employer or his or her workers' compensation insurance carrier shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his or her average weekly wage at the time of the accident.

(2) Included in the stated intent of this section is to enable an employer to reduce or diminish payments of benefits for a functional disability, disability in excess of permanent physical impairment, which, in fact, no longer exists, or exists because of discharge for misconduct in connection with the work, or because the employee left his or her work voluntarily and without good cause connected with the work.

(d) In accordance with this section, the commission may reconsider the question of functional disability and change a previously awarded disability rating based on facts occurring since the original disability determination if any party makes application for reconsideration within one (1) year after the occurrence of the facts.

(e) In considering a claim for permanent disability, the commission and the courts shall not consider the odd-lot doctrine.

(f)(1) Permanent total disability benefits shall be paid during the period of permanent total disability until the employee reaches the age of sixty-five (65); provided, with respect to permanent total disabilities resulting from injuries which occur after age sixty (60), regardless of the age of the employee, permanent total disability benefits are payable for a period of two hundred sixty (260) weeks.

(2) The purpose and intent of this subsection is to prohibit workers' compensation from becoming a retirement supplement.

(g)(1)(A) The commission, after a public hearing, shall adopt an impairment rating guide to be used in the assessment of anatomical impairment.

(B) The guide shall not include pain as a basis for impairment.

(2) The impairment rating guide adopted by the commission shall be subject to review by the General Assembly before April 1 of every odd-numbered year beginning with the regular session of 1999.

History. Init. Meas. 1948, No. 4, § 13, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 2, Acts 1957; Acts 1986 (2nd Ex. Sess.), No. 10, § 5; A.S.A. 1947, § 81-1313; Acts 1993, No. 796, § 24; 1997, No. 251, § 3; 1997, No. 260, § 3; 1999, No. 1168, § 1.

A.C.R.C. Notes. As enacted, subdivision (g)(1)(A) began: "On or before July 1,

1994."

Acts 2001, No. 1757, § 9, provided, in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

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Constitutionality.

Subsection (b) does not violate U.S. Const. Amend. 14 as the legislature was attempting to prevent the employer from being liable for benefits for the loss of the ability to earn wages while the injured employee is actually earning wages equal to the wages he was earning at the time of his injury, and that is a legitimate governmental objective. *Cook v. ALCOA*, 35 Ark. App. 16, 811 S.W.2d 329 (1991).

Subsection (f) of this section does not violate the Equal Protection Clause; the classification between those workers aged sixty-five and older, who are receiving or who are eligible to receive public or private retirement benefits, and all other workers, is not arbitrary and capricious. *Golden v. Westark Community College*, 58 Ark. App. 209, 948 S.W.2d 108 (1997), *aff'd*

in part, reversed in part, 333 Ark. 41, 969 S.W.2d 154 (1998).

Section 11-9-101 and subsection (f) of this section restate the goals of avoiding duplicate payments and of curtailing the cost of workers' compensation insurance, which are legitimate governmental concerns. *Golden v. Westark Community College*, 58 Ark. App. 209, 948 S.W.2d 108 (1997), *aff'd* in part, reversed in part, 333 Ark. 41, 969 S.W.2d 154 (1998).

Subsection (f) of this section violates the equal protection clause of the federal constitution because the justification for the age-based classification for groups receiving both workers' compensation benefits and social security retirement benefits is not rationally related to a legitimate government purpose. *Golden v. Westark Community College*, 333 Ark. 41, 969 S.W.2d 154 (1998) (decision under prior law).

Arkansas Workers' Compensation Commission erred in holding that subdivision (f)(1) of this section was constitutional where the statute created a ceasing point for permanently totally disabled (PTD) benefits so that older workers who were eligible for social security or retirement benefits were foreclosed from receiving PTD for a legitimate work-related injury; there was no rational basis for such a distinction. *Osborne v. Bekaert Corp.*, 97 Ark. App. 147, 245 S.W.3d 185 (2006).

In General.

An employee in Arkansas, suffering an unscheduled first injury, is to be paid compensation for the healing period as is done in case of a second injury or for a scheduled injury. *Pyles v. Triple F. Feeds of Texas, Inc.*, 270 Ark. 729, 606 S.W.2d 146 (Ct. App. 1980).

Scheduled injuries differ from unscheduled injuries in that the award for a scheduled injury generally is limited to the benefits provided for that particular scheduled injury. *Moser v. Arkansas Lime*

Co., 40 Ark. App. 113, 846 S.W.2d 188 (1993).

Construction.

The principal definition of the term "so long as," as used in subsection (b), is "during and up to the end of the time that." *Belcher v. Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993).

Subsection (b) of this section prohibits a claimant from receiving wage loss only "so long as" he has returned to work, obtained other employment, or has a bona fide and reasonable offer of employment. *J B Drilling Co. v. Lawrence*, 45 Ark. App. 157, 873 S.W.2d 817 (1994).

A claimant will be barred from receiving benefits for wage loss disability under subdivision (c)(2) of this section if, but for his voluntary termination of his employment, he would still be employed and thus barred from receiving such benefits because of the provisions of subsection (b). *J B Drilling Co. v. Lawrence*, 45 Ark. App. 157, 873 S.W.2d 817 (1994).

Subsection (f) of this section is not preempted by the federal Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.). *Golden v. Westark Community College*, 58 Ark. App. 209, 948 S.W.2d 108 (1997), *aff'd in part, reversed in part*, 333 Ark. 41, 969 S.W.2d 154 (1998).

Applicability.

The provisions of this section denying wage loss benefits to one who resumes work at the same or greater wage applies only to persons who were injured on or after its effective date of July 1, 1986. *Arkansas State Police v. Welch*, 28 Ark. App. 234, 772 S.W.2d 620 (1989) Criticized by *Fayetteville v. Bibb*, 30 Ark. App. 31, 781 S.W.2d 493 (1989).

Because the primary injury in the case occurred prior to the effective date of the 1986 amendment of this section, subdivision (c)(2) was not applicable. *Driscoll v. Oklahoma Gas & Elec. Co.*, 28 Ark. App. 352, 775 S.W.2d 84 (1989).

Where claimant's injury occurred before the effective date of this section, her claim for wage loss benefits was not barred by this section. *Crosby v. Micro Plastics, Inc.*, 30 Ark. App. 225, 785 S.W.2d 56 (1990).

This section did not apply where the employer failed to meet its burden of showing that its employee returned to work at wages equal to or greater than his

average weekly wage at the time of accident. *Cook v. ALCOA*, 35 Ark. App. 16, 811 S.W.2d 329 (1991).

Amount of Award.

The referee could not properly award 20% permanent partial disability based on claimant's age, training and wages where claimant sustained only a 10% injury. *Motor Queen Motel v. Sandlin*, 254 Ark. 166, 492 S.W.2d 257 (1973).

Substantial evidence supported a determination by the Arkansas Workers' Compensation Commission that an employee was entitled to a 30% wage-loss disability pursuant to subdivision (b)(1) of this section, based on his prior medical history, and testimony regarding the expected salary that he would earn upon his return to work. *Hensley v. Cooper Tire & Rubber Co.*, 2011 Ark. App. 593, — S.W.3d — (2011).

Appellate Review.

Decision of the commission was affirmed where the issue was not whether the court might have reached a different result or whether evidence would have supported a finding contrary to the commission, but whether reasonable minds could reach the same conclusion as the commission. *Williams v. St. Vincent Infirmary*, 59 Ark. App. 148, 954 S.W.2d 302 (1997).

Arkansas Workers' Compensation Commission explained its award of wage-loss benefits as follows: the employee was age 50 with only a high school education; her work history consisted primarily of clerical duties and unskilled labor; and the employee began working for the employer in November 2003 and sustained a compensable injury in December 2004. The Commission's accounting of these additional factors that could reasonably affect the employee's future earning capacity supported the twenty-percent award. *Dillard's, Inc. v. Johnson*, 2010 Ark. App. 138, — S.W.3d — (2010).

Apportionment to Body.

Where the commission found that decedent had suffered a permanent partial disability of a percentage of the body as a whole, what he might have earned for a short period of time after his injury and prior to his death did not prove the commission in error in fixing the injury to his

body as a whole. *Dockery v. Thomas*, 229 Ark. 984, 320 S.W.2d 257 (1959).

The words "loss of use of the body as a whole" when read in the light of other, nonconflicting sections of this chapter do not mean merely functional disability but include loss of use of body to earn substantial wages. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 684 (1961).

Where effect of foot amputation was continuing aggravation of back condition and five percent permanent partial disability to back, the Workers' Compensation Commission did not err in not apportioning the combined effect of amputation and back injury to the body as a whole. *Clark v. Shiloh Tank & Erection Co.*, 259 Ark. 521, 534 S.W.2d 240 (1976).

The test of whether a claimant's injury falls within § 11-9-521(a)(1) through (f) is primarily a question of law and has nothing to do with whether a doctor connects the effects of the shoulder injury to the claimant's arm; accordingly, claimant's impairment was clearly an unscheduled injury which should have been apportioned to the body as a whole pursuant to this section even if the effects of the shoulder injury extended into his arm. *Taylor v. Pfeiffer Plumbing & Heating Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983).

Burden of Proof.

To obtain benefits, it is the claimant's burden to show that injury or death of the employee was the result of an accidental injury, that arose in the course of the employment, and that it grew out of, or resulted from, the employment; however, the employer, or his workers' compensation insurance carrier, shall have the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. *Cook v. ALCOA*, 35 Ark. App. 16, 811 S.W.2d 329 (1991).

Compensation.

Employees of cleaning establishment who worked for the most part at a ranch owned by insured which was maintained primarily for advertising value were entitled to compensation. *Great Am. Indem. Co. v. Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953).

If claimant would have been able to work longer if his injuries had not oc-

curred he is entitled to compensation. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

The term compensation as used in this section refers to money benefits paid to the injured employee for disability. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Where the claimant sustained a compensable injury while working at one job, his compensation benefits were properly based on wages from that job rather than on the combined incomes of that job and another held by claimant. *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980).

Earning Capacity.

Claimant who sustained, prior to the applicability of subsection (e) of this section, a 30% decrease to his earning capacity above the permanent physical impairment established by medical evidence, was entitled to permanent partial disability benefits. *Nelson v. Timberline Int'l*, 57 Ark. App. 34, 942 S.W.2d 260 (1997).

Effect of Subsection (d).

Subsection (d) prevents an employer from just keeping or putting an injured employee on the payroll in order to invoke the application of subsection (b). *Cook v. ALCOA*, 35 Ark. App. 16, 811 S.W.2d 329 (1991).

Evidence.

In determining the extent of employee's compensable disability, it was error to consider only medical evidence; consideration should also have been given to employee's age, education, experience, and other matters affecting wage loss. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 684 (1961).

Evidence sufficient to support denial of benefits. *Jolly v. J.M. Hampton & Sons Lumber Co.*, 234 Ark. 574, 353 S.W.2d 338 (1962); *Whaley v. Hardee's*, 51 Ark. App. 166, 912 S.W.2d 14 (1995).

Evidence sufficient to support award of benefits. *Reynolds Metals Co. v. Cain*, 243 Ark. 483, 420 S.W.2d 872 (1967); *Curtis Mathes of Ark., Inc. v. Summerville*, 256 Ark. 340, 507 S.W.2d 108 (1974).

Where the claim is for permanent partial disability based on incapacity to earn, the commission should consider all competent evidence relating to the incapacity, including the age, education, experience,

and all other matters affecting the claimant's incapacity to earn the same wages he was earning at the time of his injury. *Wilson & Co. v. Christman*, 244 Ark. 132, 424 S.W.2d 863 (1968).

A commission finding establishing permanent partial disability at a figure greater than that established by medical testimony must be based on substantial evidence. *Ray v. Shelnutt Nursing Home*, 246 Ark. 575, 439 S.W.2d 41 (1969).

Evidence insufficient to support award of benefits. *Ray v. Shelnutt Nursing Home*, 246 Ark. 575, 439 S.W.2d 41 (1969); *International Paper Co. v. Langley*, 251 Ark. 859, 475 S.W.2d 686 (1972).

Substantial evidence supported the commission's finding that the claimant had only a permanent partial disability, and was not permanently totally disabled. *Smelser v. S.H. & J. Drilling Corp.*, 267 Ark. 996, 593 S.W.2d 61 (Ct. App. 1980).

The Workers' Compensation Commission's decision that the claimant's second bypass surgery was not compensable because the claimant's volitional overeating caused the disruption of the staples and was an independent and intervening cause was not supported by substantial evidence, where it was based on the testimony of doctors that the most common reason that the staples fail is overeating by the patient. *Perry v. Leisure Lodges, Inc.*, 19 Ark. App. 143, 718 S.W.2d 114 (1986).

The Workers' Compensation Commission's finding that the claimant's second gastric bypass surgery was not made necessary by complications of the first surgery was not supported by substantial evidence, where there was evidence that the doctor who performed the second surgery not only redid the gastric bypass, but also performed a procedure designed to control ulcers and corrected an incisional hernia. *Perry v. Leisure Lodges, Inc.*, 19 Ark. App. 143, 718 S.W.2d 114 (1986).

The commission's award of wage-loss disability was supported by substantial evidence. *Weyerhaeuser Co. v. McGinnis*, 37 Ark. App. 91, 824 S.W.2d 406 (1992).

Evidence supported findings of permanent partial disability by the compensation commission. *Levi Strauss & Co. v. Laymance*, 38 Ark. App. 55, 828 S.W.2d 356 (1992).

Where the Workers' Compensation Commission's decision to deny wage loss

compensation to claimant under the provisions of subsection (b) was not supported by the law and the evidence it was reversed and remanded. *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), superseded by statute as stated in, *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

The commission's denial of wage-loss disability was supported by substantial evidence. *Sapp v. Phelps Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998).

Substantial evidence supported a 50% wage-loss disability award where the medical evidence indicated that the claimant's physical abilities were limited and that she remained in a substantial amount of pain and the claimant's testimony revealed that her condition had worsened to the point where she was often immobile and that on some days she could not get out of the house or even walk. *Douglas Tobacco Prods. Co. v. Gerald, Inc.*, 68 Ark. App. 304, 8 S.W.3d 39 (1999).

Where a 57-year-old worker's occupational asthma precluded her from continuing in the line of work she had followed for 31 years, and she had only a GED, her employment opportunities may have been limited; but as the worker's compensation commission also considered her lack of motivation in finding employment, its award of 50 percent wage-loss benefits was proper. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

Workers' Compensation Commission erred in denying the claimant permanent total disability where, considering the claimant's limited education, manual-labor employment skills, severe pain in his back and legs, coupled with the side effects of necessary prescription pain medication, in addition to the testimony of his doctors and vocational expert, the appellate court was convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the commission in finding the claimant was anything less than permanently and totally disabled. *Whitlatch v. Southland Land & Dev.*, 84 Ark. App. 399, 141 S.W.3d 916 (2004).

Arkansas Workers' Compensation Commission did not err in finding that employee failed to prove permanent and total disability entitlement; the Commission found that employee lacked motivation to return to work, and the court could not

find that the Commission lacked a substantial basis for choosing to accept one treating physician's opinion over that of another physician. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005).

Substantial evidence supported the Arkansas Workers' Compensation Commission's decision that an employee did not meet his burden of proving his entitlement to permanent-total or wage-loss disability benefits because the employee's compensable injury did not require surgery, and he was issued only a one-percent impairment rating for it; the functional capacity evaluation evaluator concluded that the employee was capable of performing medium work, and neither of the employee's treating physicians opined that he was permanently and totally disabled or that he could not work; *White v. Ark. State Highway & Transp. Dep't*, 2009 Ark. App. 768, — S.W.3d — (2009).

In a workers' compensation action, wage-loss award in an amount that would be equal to only a 15-percent, whole-body impairment, was proper because the employee had job skills that did not involve activities that were physical in nature and those skills were transferable and marketable, as stated in subdivision (b)(1) of this section. *Gunter v. Ark. State Highway & Transp. Dep't*, 2012 Ark. App. 143, — S.W.3d — (2012).

Legislative Intent.

The intent of the legislature to impose a bar in subsection (b) on wage-loss benefits conditioned on continued employment or offer of employment, rather than a permanent bar, is implied by the provision for reconsideration based on changed circumstances found in subsection (d). *Belcher v. Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993).

The legislature's intent that the bar against wage loss benefits be other than permanent was implied in the provision for reconsideration of disability rating based on changed circumstances found in subsection (d) of this section. *J B Drilling Co. v. Lawrence*, 45 Ark. App. 157, 873 S.W.2d 817 (1994).

"Misconduct."

All conduct is not, as a matter of law, "misconduct in connection with the work" as that term is used in subdivision (c)(2).

Belcher v. Holiday Inn, 49 Ark. App. 64, 896 S.W.2d 440 (1995).

For guidance on the issue of misconduct in connection with work, see *Nibco, Inc. v. Metcalf & Daniels*, 1 Ark. App. 114, 613 S.W.2d 612 (1981), and concerning leaving work voluntarily, see *JB Drilling Co. v. Lawrence*, 45 Ark. App. 157, 873 S.W.2d 817 (1994). *Belcher v. Holiday Inn*, 49 Ark. App. 64, 896 S.W.2d 440 (1995).

Although claimant was discharged for excessive absenteeism, claimant was not barred from recovering wage loss under subdivision (c)(2) where claimant's absenteeism was necessitated in part by the effects of claimant's compensable injury. *Southern Steel & Wire v. Kahler*, 54 Ark. App. 376, 927 S.W.2d 822 (1996).

Offer of Employment.

Subdivision (c)(1) places the burden on the employer of providing "a bona fide offer to be employed"; this means that there must be an actual offer of employment. *Cross v. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996).

Employee who was offered his old job back was given a bona fide offer of attainable employment and was not entitled to wage-loss disability benefits on the claim that the job he chose instead provided reduced hours. *Estes v. Cedar Chems.*, 54 Ark. App. 311, 925 S.W.2d 444 (1996).

Provisions of subsection (b) of this section and § 11-9-526 did not bar an employee's wage loss claim because, although there was testimony that the employee would have been "recommended" for employment, a possible recommendation for employment was not the same as an offer of employment and the statutory bar required an actual offer of employment. *Hope Sch. Dist. v. Wilson*, 2011 Ark. App. 219, — S.W.3d — (2011).

Finding that an employer failed to make a bona fide offer of employment to a workers' compensation claimant for purposes of subdivision (b)(2) of this section was supported by substantial evidence as the claimant testified that she could not physically perform the job duties of the gelatin-packer position, and her testimony was corroborated by a co-worker, who stated that she had observed the claimant since she was injured and did not believe that the claimant could do the job; a vocational rehabilitation consultant,

after hearing the claimant's description of her difficulties, also testified that the consultant did not know whether the claimant could do the job. *Foster v. Gilster Mary Lee Corp.*, 2011 Ark. App. 735, — S.W.3d — (2011).

Percentage of Impairment.

The percentage of permanent physical impairment must be established before the Workers' Compensation Commission can consider a claim for permanent partial-disability benefits in excess of the employee's percentage of permanent physical impairment; similarly, any consideration of the employee's age, education, work experience, and other matters reasonably expected to affect his earning capacity may not occur until the commission has first determined the percentage of permanent physical impairment. *Wal-Mart Stores, Inc. v. Connell*, 340 Ark. 475, 10 S.W.3d 882 (2000).

Workers' Compensation Commission did not disagree with employer's finding that, using AMA's Guides to the Evaluation of Permanent Impairment (AMA Guides) the employee was entitled to a 24 percent impairment rating for a total shoulder arthroplasty and a 10 percent impairment rating for a distal clavicle arthroplasty, or that these ratings combined to produce an impairment rating of 32 percent, however, the employer had misinterpreted Table 27 of the AMA Guides as assigning impairment values only to the shoulder joint, when Table 27 instead assigned impairment values from arthroplasty of specific bones and joints to the entire upper extremity. *Avaya (Lucent Techs.) v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003).

"Physical Impairment."

The reference to "physical impairment" in § 11-9-704(c)(1) refers to a determination of anatomical disability as opposed to a loss of a wage earning capacity under subsection (b) of this section. *Arkansas Methodist Hosp. v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Employee was properly found not disabled under this section for back strain because she did not receive a whole-body impairment rating as a result of her compensable injury—she merely sustained a back strain, and her MRIs and myelograms show that her back was essentially

normal. Also, none of her treating doctors recommended any type of surgical intervention. *Harris v. Weyerhaeuser Co.*, 2011 Ark. App. 672, — S.W.3d — (2011).

Preclusion of Wage Loss Claim.

Subsection (b) of this section precludes a claim for wage loss benefits as a matter of law only during such time as the claimant has returned to work, obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than her average weekly wage at the time of the accident. *Belcher v. Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993).

Employee who had a compensable injury leading to an anatomical impairment but who had returned to work at the same wages as prior to his injury was not entitled to recover permanent-partial-disability benefits in excess of his impairment rating when he walked off the job due to a demotion unrelated to his physical condition, pursuant to under subdivision (b)(2) of this section. *Southwestern Energy Co. v. Ezell*, 2011 Ark. App. 782, — S.W.3d — (2011).

Res Judicata.

The Workers' Compensation Commission's finding that the claimant's second gastric bypass surgery was not compensable was not barred by *res judicata*, where the issue before the commission after the first surgery was whether the procedure was reasonable and necessary medical treatment in light of the claimant's injury, and the issue after the second surgery was whether the second procedure was a natural and incidental consequence of the first procedure. *Perry v. Leisure Lodges, Inc.*, 19 Ark. App. 143, 718 S.W.2d 114 (1986).

Wage Earning Loss.

The wage-loss factor rather than the functional or anatomical loss is controlling in disability determinations which are to be made by the commission on the basis of medical evidence, age, education, experience and other matters reasonably expected to affect the claimant's earning power. *Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985).

A worker may be entitled to additional wage loss disability even though his

wages remain the same or increase after the injury. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

Where the employer posted job opportunities on its bulletin board, it did not make bona fide offers of employment as was required by this section to bar an award of wage-loss disability, but rather invitations to bid for specific jobs to be awarded on a trial basis, in which a bid by an employee would not constitute an acceptance of an offer of employment. *Weyerhaeuser Co. v. McGinnis*, 37 Ark. App. 91, 824 S.W.2d 406 (1992).

The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Grimes v. North Am. Foundry*, 42 Ark. App. 137, 856 S.W.2d 309 (1993), *aff'd*, 316 Ark. 395, 872 S.W.2d 59 (Ark. 1994).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood; the Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage-loss, such as the claimant's age, education, and work experience. *Cross v. Crawford County Mem. Hosp.*, 54 Ark. App. 130, 923 S.W.2d 886 (1996).

Where employee was 58 years old, had limited education, and had worked as a mechanic for many years, the Arkansas Workers' Compensation Commission had substantial evidence justifying its decision to award employee a twenty-five percent wage loss in excess of an impairment rating under subdivision (b)(1) of this section. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

Arkansas Workers' Compensation Commission erred when it determined that employee seeking benefits for a compensable back injury lacked motivation to return to work due to the fact that he refused to move from a certain geographical location. *Johnson v. Latex Constr. Co.*, 94 Ark. App. 431, 232 S.W.3d 504 (2006).

In a workers' compensation case, there was no error in awarding a benefits claimant a sixty-percent wage-loss disability under § 11-9-522(b) where his age, intellectual range, impairment rating, prior employment, and complaints of pain and difficulty sleeping were considered; his depression was not considered. Moreover, a videotape showing him performing cer-

tain activities was explained by the claimant's addiction to pain medication, and a doctor's decision to return the claimant to work was not credible based on the results of a valid functional-capacity evaluation. *SSI, Inc. v. Lohman*, 98 Ark. App. 294, 254 S.W.3d 804 (2007).

Where a benefits claimant refused to pursue two jobs, reported that he was unable to work the jobs, and refused to accept or read mail that came to him in connection with job-placement assistance, substantial evidence supported the denial of wage-loss benefits under § 11-9-505(b)(3). Moreover, there was no reasonable cause for his decision since his physician approved the jobs, and his financial incentive argument was rejected. *Johnson v. McKee Foods*, 98 Ark. App. 360, 255 S.W.3d 478 (2007).

Employee was properly found to have sustained a 20 percent wage-loss disability pursuant to subdivision (b)(1) of this section after suffering a torn rotator cuff because the employee could not use the employee's left upper extremity for long periods of time; it was reasonable to believe that the employee would be unable to return to driving over the road for 11 hours a day as a truck driver. *Averitt Express, Inc. v. Gilley*, 104 Ark. App. 16, 289 S.W.3d 118 (2008).

Arkansas Workers' Compensation Commission erred in finding that the job in the forge department was a bona fide offer of employment that disqualified the employee from receiving wage-loss benefits under this section, given the evidence that defendant was not physically capable of performing a labor-intensive job in a hot environment. *Sivixay v. Danaher Tool Group*, 2009 Ark. App. 786, 359 S.W.3d 433 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 20 (Jan. 6, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 153 (Mar. 11, 2010).

Arkansas Workers' Compensation Commission's opinion displayed a substantial basis for denying an employee's claims for permanent total disability under the Worker's Compensation or additional wage-loss benefits because noting the employee's testimony and the reports of his surgeon, the Commission concluded that the only change in physical condition related to his compensable cervical injuries was the fact that his cervical problems

had dramatically improved following his third cervical surgery; the Commission found that the employee was vastly improved since its prior decision awarding him benefits. *Martin v. Jensen Constr. Co.*, 2010 Ark. App. 294, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 448 (May 12, 2010).

Arkansas Workers' Compensation Commission did not err in finding that an employee failed to prove that the employee was entitled to additional wage-loss disability benefits under subdivision (b)(1) of this section after a 400-pound steel bar hit the employee on top of the head because although the employee testified that the employee was still in pain after neck surgery, the employee acknowledged that the employee's symptoms had improved since that time. *Kelley v. Cooper Std. Auto.*, 2011 Ark. App. 665, — S.W.3d — (2011).

Workers' Compensation Commission found that appellee was totally and permanently disabled and was injured to an extent that he could only perform services that were limited such that a reasonable stable market for such services did not exist, and thus the Commission improperly relied on the odd-lot doctrine contrary to subsection (e) of this section. *Am. Eagle Airlines v. Berndt*, 2012 Ark. App. 220, — S.W.3d — (2012).

Although the employee might be right that the factors considered by the Workers' Compensation Commission would also support a claim of total and permanent disability under § 11-9-519, the court could not make that determination because the Commission's finding of permanent disability was supported in part by the improper odd-lot doctrine finding, and thus the court reversed in this regard and remanded. *Am. Eagle Airlines v. Berndt*, 2012 Ark. App. 220, — S.W.3d — (2012).

—Odd-Lot Doctrine.

An employee who was injured prior to the applicable date of subsection (e) of this section, to the extent that he could perform services that were so limited in quality, dependability, or quantity that a reasonably stable market for them did not exist could be classified as totally disabled. This employee was said to fall within the former odd-lot category of dis-

abled workers. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992), rehearing denied, 40 Ark. App. 113, 846 S.W.2d 188 (1993), superseded by statute as stated in, *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999); *Nelson v. Timberline Int'l*, 57 Ark. App. 34, 942 S.W.2d 260 (1997).

Employees who are able to work only a small amount are not precluded from being considered totally disabled because they can work some, under the former "odd-lot" doctrine, if their overall job prospects are negligible. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 108, 842 S.W.2d 456 (1992), rehearing denied, 40 Ark. App. 113, 846 S.W.2d 188 (1993), superseded by statute as stated in, *Buford v. Standard Gravel Co.*, 68 Ark. App. 162, 5 S.W.3d 478 (1999).

Despite his argument that he made a prima facie case of entitlement to permanent total disability benefits under the former odd-lot doctrine, where claimant's treating physicians opined that the claimant could perform light duty work, the Commission was correct to find that he was not totally disabled. *Nelson v. Timberline Int'l*, 57 Ark. App. 34, 942 S.W.2d 260 (1997).

The odd lot doctrine did not apply to a claimant who, at the time he reached his maximum medical improvement, was a 28 year old high school graduate who could, according to the functional capacity assessment, perform, at a minimum, six out of every ten available jobs on the market. *Goodwin v. Phillips Petro. Co.*, 72 Ark. App. 302, 37 S.W.3d 644 (2001).

Wage Loss Claim Not Permanently Barred.

The commission's finding with respect to subsection (b), that a claimant who has once returned to work at equal or greater wages is permanently barred from receiving benefits for a loss in wage earning capacity, even should her subsequent employment cease, unless the claimant is terminated for reasons relating to her compensable injury, was erroneous. *Belcher v. Holiday Inn*, 43 Ark. App. 157, 868 S.W.2d 87 (1993).

Employee was properly awarded 10 percent permanent wage loss disability because while the employee returned to work as a truck driver following back surgery, that did not forever foreclose the

employee from wage-loss disability benefits under subdivision (b)(2) of this section as the employee's return to work aggravated the employee's condition to the extent that the employee could no longer work. *Enter. Prods. Co. v. Leach*, 2009 Ark. App. 148, 316 S.W.3d 253 (2009).

Cited: *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Abbott v. C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968); *Bibler Bros. Lumber Co. v. Allen*, 251 Ark. 593, 474 S.W.2d 116 (1971); *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971); *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978); *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Hammer v. Intermed N.W.*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (1980); *Midwest Steel Co. v. Mulanax*, 270 Ark. 914, 606 S.W.2d 606 (1980); *Moun-*

tain Valley Superette, Inc. v. Bottorff, 4 Ark. App. 251, 629 S.W.2d 320 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984); *C.J. Horner Co. v. Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *General Indus. v. Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987); *Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990); *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994); *Smith v. Gerber Prods.*, 54 Ark. App. 57, 922 S.W.2d 365 (1996); *Ellison v. Therma-Tru*, 66 Ark. App. 286, 989 S.W.2d 927 (1999); *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003); *Michael v. Keep & Teach, Inc.*, 87 Ark. App. 48, 185 S.W.3d 158 (2004); *Rutherford v. Mid-Delta Cmty. Servs.*, 102 Ark. App. 317, 285 S.W.3d 248 (2008); *Maulding v. Price's Util. Contrs., Inc.*, 2009 Ark. App. 776, 358 S.W.3d 915 (2009).

11-9-523. Compensation for disability — Hernia.

(a) In all cases of claims for hernia, it shall be shown to the satisfaction of the Workers' Compensation Commission:

(1) That the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;

(2) That there was severe pain in the hernial region;

(3) That the pain caused the employee to cease work immediately;

(4) That notice of the occurrence was given to the employer within forty-eight (48) hours thereafter; and

(5) That the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two (72) hours after the occurrence.

(b)(1) In every case of hernia, it shall be the duty of the employer forthwith to provide the necessary and proper medical, surgical, and hospital care and attention to effectuate a cure by radical operation of the hernia, to pay all reasonable expenses in connection therewith, and, in addition, to pay compensation not exceeding a period of twenty-six (26) weeks.

(2) In case the employee shall refuse to permit the operation, it shall be the duty of the employer to provide all necessary first aid, medical and hospital care and service, to supply the proper and necessary truss or other mechanical appliance to enable the employee to resume work,

to pay all reasonable expenses in connection therewith, and, in addition, to pay compensation not exceeding a period of thirteen (13) weeks.

(c) In case death results within a period of one (1) year, either from the hernia or from the radical operation thereof, compensation shall be paid the dependents as provided in other death cases under this chapter.

(d) Recurrence of the hernia following radical operation thereof shall be considered a separate hernia, and the provisions and limitations regarding the original hernia shall apply.

History. Init. Meas. 1948, No. 4, § 13, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 2, Acts 1957; Acts 1959, No. 144, § 1; Init. Meas. 1968, No. 1, §§ 2, 3, Acts 1969; Acts 1973, No. 221, § 2; 1975, No. 288, § 1; A.S.A. 1947, § 81-1313.

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Time for Filing.

Construction.

The courts should not be hypertechnical when construing this section regarding hernia. *Darling Store Fixtures v. McDonald*, 54 Ark. App. 60, 922 S.W.2d 748 (1996).

The word "occurrence" appears four times within this section, two of which are within the phrase "occurrence of the hernia"; clearly, when used within this phrase, "occurrence" means the happening of the hernia itself, not necessarily the work event resulting in the hernia. *Min-Ark Pallet Co. v. Lindsey*, 58 Ark. App. 309, 950 S.W.2d 468 (1997).

Applicability.

The special requirements imposed by this section on cases involving hernias do not apply to hiatal hernias. *Loveless v. Garrison Furn. Co.*, 251 Ark. 776, 475 S.W.2d 158 (1972); *Public Employee*

Claims Div. v. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992).

The requirements of this section are designed to make an award of compensation for a hernia dependent on the manner in which the hernia occurred rather than on its mere existence and to separate congenital or preexisting hernias from those resulting from trauma or effort at work. *Ayres v. Historic Preservation Assocs.*, 24 Ark. App. 40, 747 S.W.2d 587 (1988).

Additional Benefits.

Claimant not entitled to additional benefits because of hernia severity in view of this section specifically limiting compensation to a period of 26 weeks. *Jobe v. Capitol Prods. Corp.*, 230 Ark. 1, 320 S.W.2d 634 (1959).

Where an employee has had good results from a hernia operation and where his total disability results from his susceptibility to the recurrence of the hernia, he is not entitled to benefits for total disability under § 11-9-519 of this section, but is limited to the benefits provided by the hernia provision in this section. *Smith v. Riceland Food*, 261 Ark. 10, 545 S.W.2d 604 (1977).

Claimant was not entitled to receive permanent disability benefits because of infections and complications resulting from his hernia surgeries where the medical evidence presented did not indicate that the claimant's failure to heal promptly caused him to suffer any greater disability than any other person sustaining a severe hernia injury. *Tibbs v. Dixie Bearings, Inc.*, 9 Ark. App. 150, 654 S.W.2d 588 (1983).

Where claimant's disability resulted from complications from his hernia surgery, the disability was separate and distinct from the hernia and the twenty-six week compensation cap in subdivision (b)(1) did not apply. *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

Appellate Review.

When reviewing the sufficiency of the evidence to support a decision of the Workers' Compensation Commission, the appellate court will view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Workers' Compensation Commission and affirm that decision if it is supported by substantial evidence. *Cagle Fabricating & Steel, Inc. v. Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993).

Compensation.

Employees of cleaning establishment who worked for the most part at a ranch owned by insured which was maintained primarily for advertising value were entitled to compensation. *Great Am. Indem. Co. v. Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953).

If claimant would have been able to work longer if his injuries had not occurred he is entitled to compensation. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

The term compensation as used in this section refers to money benefits paid to the injured employee for disability. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Where the claimant sustained a compensable injury while working at one job, his compensation benefits were properly based on the wages from that job rather than on the combined incomes of that job and another held by claimant. *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980).

Permanent partial disability benefits provided in § 11-9-522 are not payable in hernia cases because compensation is limited to that provided in this section. *Rash v. Goodyear Tire & Rubber Co.*, 18 Ark. App. 248, 715 S.W.2d 449 (1986).

Elements.

—In General.

A hernia is not presumed to be compensable merely because the elements of this

section are met. *Riley v. Monark Boat Co.*, 269 Ark. 819, 602 S.W.2d 411 (Ct. App. 1980).

This chapter does not provide benefits for every injury sustained by an employee in the course of his employment; thus the statute provides no benefits in claims for hernia unless five different things are shown to the satisfaction of the commission. *Humbert v. Arkansas State Hwy. & Transp. Dep't*, 270 Ark. 853, 606 S.W.2d 377 (1980).

—Attendance of Physician.

Evidence sufficient to show compliance with subdivision (a)(5). *Williams Mfg. Co. v. Walker*, 206 Ark. 392, 175 S.W.2d 380 (1943) (decision under prior law); *Crossett Co. v. Childers*, 234 Ark. 320, 351 S.W.2d 841 (1961); *Lashlee Steel Co. v. Dodridge*, 250 Ark. 520, 465 S.W.2d 691 (1971); *Ammons v. Meuwly Mach. Works*, 266 Ark. 851, 587 S.W.2d 590 (1979).

Subdivision (a)(5) does not require claimant to prove that he actually was attended by physician within time period, but only that the distress following descent of the hernia was such as to require attendance of physician within time period. *S.E. Prince Poultry Co. v. Stevens*, 235 Ark. 1034, 363 S.W.2d 929 (1963); *Ayres v. Historic Preservation Assocs.*, 24 Ark. App. 40, 747 S.W.2d 587 (1988); *Darling Store Fixtures v. McDonald*, 54 Ark. App. 60, 922 S.W.2d 748 (1996).

Commission could properly excuse failure of employee to go to doctor within the time period following the occurrence of the hernia where employee immediately reported his injury to his employer and employer asked employee to continue on light work and to go to a doctor in a day or two if he did not feel better. *S.E. Prince Poultry Co. v. Stevens*, 235 Ark. 1034, 363 S.W.2d 929 (1963).

Evidence sufficient of delay in consultation of physician leading to denial of claim. *Miller Milling Co. v. Amyett*, 240 Ark. 756, 402 S.W.2d 659 (1966); *Haygood v. Turner*, 247 Ark. 724, 447 S.W.2d 316 (1969); *Harkleroad v. Cotter*, 248 Ark. 810, 454 S.W.2d 76 (1970); *Morgan v. C & C Mach. Shop, Inc.*, 256 Ark. 193, 506 S.W.2d 115 (1974).

Evidence insufficient to show that physical distress existed and denial of claim was proper. *Morgan v. C & C Mach. Shop, Inc.*, 256 Ark. 193, 506 S.W.2d 115

(1974) (decision prior to 1975 amendment).

This section does not require claimant to prove he was actually attended by a physician within 72 hours after the injury; the statutory requirement is met if the evidence shows that within 72 hours after the injury the claimant's condition was such that he sought and needed the services of a physician. *Ammons v. Meuwly Mach. Works*, 266 Ark. 851, 587 S.W.2d 590 (1979); *Brim v. Mid-Ark Truck Stop*, 6 Ark. App. 119, 639 S.W.2d 75 (1982); *Ayres v. Historic Preservation Assocs.*, 24 Ark. App. 40, 747 S.W.2d 587 (1988).

Where claimant told her employer that she had hurt her abdomen quite badly and that she needed to see a doctor about the injury but she could not afford to, the employer had an affirmative duty to send the claimant to a doctor to determine the extent of her injury, and therefore, the employer was estopped from insisting upon strict compliance with subdivision (a)(5). *Brim v. Mid-Ark Truck Stop*, 6 Ark. App. 119, 639 S.W.2d 75 (1982).

There is no requirement that a claimant prove that he was actually attended by a physician within 72 hours but only that he needed the services of a physician during that period; a diagnosis of a hernia would confirm the need of the services of a physician. *Osceola Foods, Inc. v. Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985).

Subdivision (a)(5) means that the claimant must demonstrate that there was a need to consult a doctor within the 72-hour period. *Cagle Fabricating & Steel, Inc. v. Patterson*, 309 Ark. 365, 830 S.W.2d 857 (1992).

—Cessation of Work.

Evidence insufficient to find claimant's injury caused her to cease work immediately. *Bottoms Baptist Orphanage v. Johnson*, 240 Ark. 175, 398 S.W.2d 544 (1966); *Haygood v. Turner*, 247 Ark. 724, 447 S.W.2d 316 (1969); *Bibler Bros. Lumber Co. v. Allen*, 251 Ark. 593, 474 S.W.2d 116 (1971); *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971); *King v. Puryear Wood Prods.*, 254 Ark. 452, 494 S.W.2d 123 (1973); *Osceola Foods, Inc. v. Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985).

The causal connection between work strain and a hernia should not be determined by mathematical formulas or mea-

sured by minutes or hours; it should be based on evidence which satisfies the finder of fact that the cessation from work became necessary soon enough after the trauma to establish that there was a causal connection under the circumstances of the case. *Osceola Foods, Inc. v. Andrew*, 14 Ark. App. 95, 685 S.W.2d 813 (1985); *Ayres v. Historic Preservation Assocs.*, 24 Ark. App. 40, 747 S.W.2d 587 (1988).

—Notice to Employer.

An injured employee would not be required to report a hernia within the 48 hour period where he did not know that he had received a hernia; however, he might still be required to report the injury. *McMurtry v. Marshall Model Market*, 237 Ark. 11, 371 S.W.2d 4 (1963); *Siders v. Southern Mattress Co.*, 240 Ark. 267, 398 S.W.2d 901 (1966).

All of the requirements of this section were satisfied where claimant testified that he felt a burning pain in his side when he lifted a pallet (subdivision (a)(1)), claimant said that the pain "almost brought me to my knees" and that he stopped working in order to call his mother (subdivisions (a)(2) and (3)), claimant discussed his problem with a co-worker who was the wife of one of the company owners within forty-eight hours of the onset of the pain (subdivision (a)(4)), and where the physical distress required the attendance of a physician within the amount of time required by subdivision (a)(5), even though the physician was not actually seen within the seventy-two hour time frame (subdivision (a)(5)). *Min-Ark Pallet Co. v. Lindsey*, 58 Ark. App. 309, 950 S.W.2d 468 (1997).

There was substantial evidence to show that the claimant did not meet the statutory notice requirements in relation to his new hernia condition where (1) on a day that he had a doctor's appointment related to a prior work-related hernia condition, he felt a sharp pain in his groin and thought he had reinjured his prior hernia, but then realized that his pain was coming from the other side, (2) he stopped working, mentioned the pain to his supervisor and asked to go to the company nurse's office to wait for a ride to his appointment, (3) as he sat in the nurse's office, he did not mention to the nurse that he had injured himself, (4) at his doctor's

appointment, he informed the doctor that he felt a pain in his left side, and the doctor diagnosed a new hernia, but the claimant never informed the doctor that he had injured himself at work, and (5) the claimant did not report that his new hernia condition was work-related until five days after the injury. *Daniels v. Affiliated Foods S.W.*, 70 Ark. App. 319, 17 S.W.3d 817 (2000).

—Severe Pain.

Testimony that claimant experienced a “a slight burning sensation” and a sticking or pinching feeling in certain positions was sufficient to support the commission’s finding of severe pain. *Darling Store Fixtures v. McDonald*, 54 Ark. App. 60, 922 S.W.2d 748 (1996).

—Sudden Effort, Etc.

Evidence sufficient to support finding that claimant had failed to establish that occurrence of hernia immediately followed a sudden effort or severe strain. *King v. Puryear Wood Prods.*, 254 Ark. 452, 494 S.W.2d 123 (1973).

Describing pain as “sudden” rather than “severe” held not to be deemed significant. *Ayres v. Historic Preservation Assocs.*, 24 Ark. App. 40, 747 S.W.2d 587 (1988).

Evidence.

Evidence was sufficient to sustain commission’s finding that worker sustained a compensable injury which caused hernia for which he was operated upon, and then died a few days later. *Baker v. Silaz*, 205 Ark. 1069, 172 S.W.2d 419 (1943) (decision under prior law).

Evidence was sufficient to sustain a denial of compensation by the commission for failure to meet the requirements of this section. *Potlatch Forests, Inc. v. Burks*, 244 Ark. 714, 426 S.W.2d 819 (1968).

Commission’s denial of benefits was not supported by substantial evidence. *Riley v. Monark Boat Co.*, 269 Ark. 819, 602 S.W.2d 411 (Ct. App. 1980).

Whether or not a second lifting incident caused the hernia, or caused a reinjury or aggravation is a medical question. *Humbert v. Arkansas State Hwy. & Transp. Dep’t*, 270 Ark. 853, 606 S.W.2d 377 (1980).

The requirement that the “physical distress” caused by a hernia “shall be shown

to the satisfaction of the commission,” which applies to each of the five subdivisions of subsection (a), refers to the Workers’ Compensation Commission’s own standard of review, which imposes upon that body the duty of making its findings in accordance with a preponderance of the evidence. *Ayres v. Historic Preservation Assocs.*, 24 Ark. App. 40, 747 S.W.2d 587 (1988).

Commission erred in premising denial of coverage on two inconsistent findings of fact. *Bonner v. McKee Baking Co.*, 29 Ark. App. 1, 776 S.W.2d 364 (1989).

Workers’ Compensation Commission’s conclusion that appellant failed to prove by a preponderance of the evidence that he suffered a compensable hernia was reversed. *Price v. Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993).

The Workers’s Compensation Commission erred in failing to find the claimant’s hernia compensable and refusing to award benefits where the evidence was clear that the claimant suffered severe groin pain and other related symptoms only on April 13 and such injury satisfied all of the statutory requirements for compensability, notwithstanding that the claimant reported occurrences on both April 11 and April 13, and any April 11 injury did not satisfy the statutory requirements for compensability. *Cooper v. McBurney Corp.*, 72 Ark. App. 332, 39 S.W.3d 1 (2001).

Operation.

Workers’ Compensation Act did not require either the employer or the insurance carrier to authorize an operation for hernia sustained by employee in order for liability to attach. *Baker v. Silaz*, 205 Ark. 1069, 172 S.W.2d 419 (1943) (decision under prior law).

Time for Filing.

One having a claim for hernia does not have to wait until some complication arises before filing his claim. *Hudgens v. Southern Extrusions, Inc.*, 244 Ark. 470, 425 S.W.2d 718 (1968).

Claim filed approximately 18 months after disability was too late for a recurring hernia which was determined by the claimant’s physician to exist approximately 6 months prior to the time of disability, disabled him from working un-

til June, 1965. *Hudgens v. Southern Extrusions, Inc.*, 244 Ark. 470, 425 S.W.2d 718 (1968).

Cited: *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Abbott v. C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968); *Bibler Bros. Lumber Co. v. Allen*, 251 Ark. 593, 474 S.W.2d 116 (1971); *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971); *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978); *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Hammer v. Intermed N.W.*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Weeks v. Coca Cola*

Bottling Co., 270 Ark. 151, 604 S.W.2d 566 (1980); *Midwest Steel Co. v. Mulanax*, 270 Ark. 914, 606 S.W.2d 606 (1980); *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984); *C.J. Horner Co. v. Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *General Indus. v. Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987); *Baldor Elec. Co. v. Jones*, 29 Ark. App. 80, 777 S.W.2d 586 (1989); *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993).

11-9-524. Compensation for disability — Disfigurement.

(a) The Workers' Compensation Commission shall award compensation for serious and permanent facial or head disfigurement in a sum not to exceed three thousand five hundred dollars (\$3,500).

(b) No award for disfigurement shall be entered until twelve (12) months after the injury.

History. Init. Meas. 1948, No. 4, § 13, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 2, Acts 1957; Acts 1959, No. 144, § 1; Init. Meas. 1968, No. 1, §§ 2, 3, Acts 1969;

1975 (Extended Sess., 1976), No. 1227, §§ 8-10; 1979, No. 253, § 4; 1981, No. 290, § 4; A.S.A. 1947, § 81-1313.

RESEARCH REFERENCES

Ark. L. Rev. Workmen's Compensation — Disfigurement of Face or Head — Proof

of Impaired Earning Capacity as a Prerequisite, 16 Ark. L. Rev. 314.

CASE NOTES

ANALYSIS

Compensable Disfigurement.
Compensation.
Evidence.
Time for Award.

Compensable Disfigurement.

The only compensable disfigurement is one that affects earning capacity in a similar employment. *Long-Bell Lumber Co. v. Mitchell*, 206 Ark. 854, 177 S.W.2d 920 (1944) (decision under prior law).

Evidence supported commission's finding that injury would not affect his ability to secure employment and did not result

in facial disfigurement. *Long-Bell Lumber Co. v. Mitchell*, 206 Ark. 854, 177 S.W.2d 920 (1944) (decision under prior law).

Compensation denied where there was no evidence that claimant had been refused employment or that his disfigurement would cause any refusal in the future of employment similar to that engaged in at the time injury was received. *Jolly v. J.M. Hampton & Sons Lumber Co.*, 234 Ark. 574, 353 S.W.2d 338 (1962).

In a workers' compensation case, employee sustained a compensable injury when ceramic glaze splashed into his eye while he was teaching an art class; fur-

ther, employee was entitled to \$3000 for his facial disfigurement as the judge found that his eye was watery looking, red, and had a permanently dilated pupil that detracted from the employee's appearance. *Fayetteville Sch. Dist. v. Kunzelman*, 93 Ark. App. 160, 217 S.W.3d 149 (2005).

Compensation.

Employees of cleaning establishment who worked for the most part at a ranch owned by insured which was maintained primarily for advertising value were entitled to compensation. *Great Am. Indem. Co. v. Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953).

If claimant would have been able to work longer if his injuries had not occurred he is entitled to compensation. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

The term compensation as used in this section refers to money benefits paid to the injured employee for disability. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Where the claimant sustained a compensable injury while working at one job, his compensation benefits were properly based on wages from that job rather than on the combined incomes of that job and another held by claimant. *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980).

Evidence.

Commission properly refused to accept proffered evidence of witness as to the effect of claimant's disfigurement on his employment as witness possessed no particular qualifications for determining likelihood of claimant's being refused employment. *Jolly v. J.M. Hampton & Sons Lumber Co.*, 234 Ark. 574, 353 S.W.2d 338 (1962).

Time for Award.

It was the legislative intent that the Workers' Compensation Commission should defer a final disfigurement award until completion of claimant's plastic surgery or until the claimant elects to forego surgery. *Bates Reel Co. v. Breashears*, 263 Ark. 919, 567 S.W.2d 959 (1978).

Cited: *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Abbott v. C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968); *Bibler Bros. Lumber Co. v. Allen*, 251 Ark. 593, 474 S.W.2d 116 (1971); *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971); *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978); *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (1980); *Hammer v. Intermed N.W.*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Midwest Steel Co. v. Mulanax*, 270 Ark. 914, 606 S.W.2d 606 (1980); *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984); *C.J. Horner Co. v. Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *General Indus. v. Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987); *Cheshire v. Foam Molding Co.*, 37 Ark. App. 78, 822 S.W.2d 412 (1992).

11-9-525. Compensation for disability — Second injuries.

(a)(1) The Second Injury Trust Fund established in this chapter is a special fund designed to ensure that an employer employing a worker with a disability will not, in the event that the worker suffers an injury on the job, be held liable for a greater disability or impairment than actually occurred while the worker was in his or her employment.

(2) The employee is to be fully protected in that the fund pays the worker the difference between the employer's liability and the balance of his or her disability or impairment that results from all disabilities or impairments combined.

(3) It is intended that latent conditions that are not known to the employee or employer not be considered previous disabilities or impairments which would give rise to a claim against the fund.

(b)(1) Commencing January 1, 1981, all cases of permanent disability or impairment in which there has been previous disability or impairment shall be compensated as provided in this section.

(2) Compensation shall be computed on the basis of the average earnings at the time of the last injury.

(3) If any employee who has a permanent partial disability or impairment, whether from compensable injury or otherwise, receives a subsequent compensable injury resulting in additional permanent partial disability or impairment so that the degree or percentage of disability or impairment caused by the combined disabilities or impairments is greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of combined disabilities or impairments, then the employer at the time of the last injury shall be liable only for the degree or percentage of disability or impairment that would have resulted from the last injury had there been no preexisting disability or impairment.

(4) After the compensation liability of the employer for the last injury, considered alone, which shall be no greater than the actual anatomical impairment resulting from the last injury, has been determined by an administrative law judge or the Workers' Compensation Commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by the administrative law judge or the commission, and the degree or percentage of disability or impairment that existed prior to the last injury plus the disability or impairment resulting from the combined disability shall be determined, and compensation for that balance, if any, shall be paid out of the fund provided for in § 11-9-301.

(5) If the previous disability or impairment, whether from compensable injury or otherwise, and the last injury together result in permanent total disability, the employer at the time of the last injury shall be liable only for the actual anatomical impairment resulting from the last injury considered alone and of itself. However, if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in §§ 11-9-501 — 11-9-506 for permanent total disability, then, in addition to the compensation for which the employer is liable and after the completion of payment of compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under §§ 11-9-501 — 11-9-506 out of the fund.

(6) The Treasurer of State shall be the custodian of the fund, and any interest accruing shall be added thereto.

(7) The commission shall direct the distribution of the funds from the fund.

(c)(1) In all cases in which a recovery against the fund is sought for permanent partial disability or for permanent total disability, the Treasurer of State as custodian shall be named as a party and shall be entitled to defend against the claim.

(2) The Treasurer of State, with the advice and consent of the Attorney General, may enter into settlements as contemplated by §§ 11-9-804 and 11-9-805.

(3) All awards for permanent partial disability or for permanent total disability affecting the fund shall be subject to the provisions of the Workers' Compensation Law, § 11-9-101 et seq., governing review and appeal.

(d)(1) If more than one (1) injury in the same employment causes concurrent temporary disabilities, weekly benefits shall be payable only for the longest and largest paying disability.

(2) If more than one (1) injury in the same employment causes concurrent and consecutive permanent partial disability, weekly benefits for each subsequent disability shall not begin until the end of the compensation period for the prior disability.

(e)(1) No claims under this section shall be made on or after January 1, 2008.

(2) For all claims for permanent partial disability or permanent total disability made on or after January 1, 2008, the employer at the time of the employee's compensable injury is liable for such benefits subject to this chapter, excluding subsections (a)-(d) of this section.

(f)(1) A claimant who has been deemed permanently totally disabled and is currently receiving benefits from the Second Injury Trust Fund as of December 31, 2009, shall receive those benefits from the Death and Permanent Total Disability Trust Fund commencing January 1, 2010.

(2) For all claims pending against the Second Injury Trust Fund on and after January 1, 2010, if a claimant becomes eligible to receive benefits for permanent total disability from the Second Injury Trust Fund, then upon completion of payment by the employer of its obligation under subdivision (b)(5) of this section, the claimant shall be paid the remainder of the compensation that would be due for permanent total disability from the Death and Permanent Total Disability Trust Fund.

History. Init. Meas. 1948, No. 4, § 13, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 2, Acts 1957; Init. Meas. 1968, No. 1, §§ 2, 3, Acts 1969; Acts 1973, No. 221, § 2; 1979, No. 253, § 4; 1981, No. 290, § 4; A.S.A. 1947, § 81-1313; Acts 2007, No. 1415, § 1; 2009, No. 327, §§ 2, 3.

A.C.R.C. Notes. Pursuant to § 1-2-124, the term "handicapped worker" has been replaced with "worker with a disability."

RESEARCH REFERENCES

Ark. L. Rev. Case Note, *Del Monte Frozen Foods, Inc. v. Harmon*: Second Injury Fund Liability for Previous "Impairment" after Osage Oil, 40 Ark. L. Rev. 589.

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Workers' Compensation, 10 U. Ark. Little Rock L.J. 251.

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CASE NOTES

ANALYSIS

Constitutionality.

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Purpose.

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Liability for Second Injury.

—In General.

—Apportionment.

—Preexisting Condition.

Repeal of Prior Provisions.

Scheduled Injury.

Separate Injuries.

Wage Earning Loss.

Constitutionality.

Statutes limiting recovery for permanent total disability resulting from a second injury while working for the same employer, but leaving open ended the recovery for permanent total disability from a single injury are not unconstitutional as an unreasonable classification, since the purpose is to encourage employers to retain injured employees. *Corbitt v. Mohawk Rubber Co.*, 256 Ark. 932, 511 S.W.2d 184 (1974).

In General.

Second Injury Fund liability is premised on the fact that the prior disability is in esse at the time of employment and is neither caused nor contributed to by the employment. *Prier Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988).

Construction.

The term compensation as used in this section refers to money benefits paid to the injured employee for disability. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Impairment means loss of earning capacity due to a nonwork-related condition. *Osage Oil Co. v. Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985). But see *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988); *State Treasurer, Second Injury Fund v. Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985).

The definition of "impairment" no longer includes "non-work-related condition"; there seems to be no real justification for limiting "impairment" to a non-work-related condition. *White Consol. v. Rooney*, 44 Ark. App. 78, 866 S.W.2d 838 (1993), *aff'd*, *Second Injury Trust Fund v. White Consol.*, 317 Ark. 26, 875 S.W.2d 834 (1994).

The legislature added the words "or impairment" to make it clear that "non-work-related" conditions were included; by implication, at least, this suggests that "work-related" conditions were already included in the term "disability." *White Consol. v. Rooney*, 44 Ark. App. 78, 866 S.W.2d 838 (1993), *aff'd*, *Second Injury Trust Fund v. White Consol.*, 317 Ark. 26, 875 S.W.2d 834 (1994).

A preexisting impairment under subdivision (b)(5) of this section can be either work related or non-work related. *Second Injury Trust Fund v. POM, Inc.*, 316 Ark. 796, 875 S.W.2d 832 (1994).

Defining "impairment" to necessarily include wage loss is wrong since it would undermine the purpose of the Second Injury Trust Fund to encourage the hiring of handicapped persons. *Second Injury Trust Fund v. POM, Inc.*, 316 Ark. 796, 875 S.W.2d 832 (1994).

The term "impairment" in subdivision (b)(5) of this section is not limited to a condition resulting from a previous injury which caused wage loss, and thus the Second Injury Fund may be liable for a portion of a worker's total disability when permanent total disability results from a second injury to one who suffered "impairment" from a previous injury which did not result in wage loss when it occurred. *Second Injury Trust Fund v. White Consol.*, 317 Ark. 26, 875 S.W.2d 834 (1994).

In construing statutes relating to the Second Injury Fund, the appellate court will interpret them strictly in light of the limited and restricted nature of the Fund and the need to ensure its solvency. *Stucco, Inc. v. Rose*, 52 Ark. App. 42, 914 S.W.2d 767 (1996), *rev'd*, *Stucco Plus v. Rose*, 327 Ark. 314, 938 S.W.2d 556 (Ark. 1997).

Where the claimant has a preexisting injury and incurs a subsequent injury entitling him to total disability benefits, the employer's liability for the claimant's benefits is limited to the subsequent injury alone, and thus its liability is at the permanent partial disability rate. *Stucco Plus v. Rose*, 327 Ark. 314, 938 S.W.2d 556 (Ark. 1997).

Because § 11-9-1001 discourages judicial lawmaking and because the Court of Appeals must defer to decisions of the Supreme Court, the Appeals Court could not broaden the scope of workers' compensation law so that the Second Injury Fund would become liable for wage-loss disability benefits payable to a disabled worker in the event of successive injuries during the same employment. *Maxey v. Tyson Foods, Inc.*, 341 Ark. 306, 18 S.W.3d 328 (2000).

Purpose.

The purpose of the Second Injury Fund is to encourage the employment of handicapped workers by providing that in the event of injury to those workers the employer will not have to pay for any more disability than actually occurred in his employment, and the purpose is not to give a windfall or subsidy to those employers. *Osage Oil Co. v. Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985). But see *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

The first two sentences of this section expressly state the purposes of the Second

Injury Fund statute to limit the employer's liability and simultaneously fully protect an already handicapped employee where he is subsequently injured on the job. *State Treasurer, Second Injury Fund v. Coleman*, 16 Ark. App. 188, 699 S.W.2d 401 (1985).

The purpose of this section is to ensure that an employer employing a handicapped worker will not be required to pay for a greater amount of disability or impairment than that which the worker sustains while in the employment of that employer. *Second Injury Fund v. McCarver*, 17 Ark. App. 101, 704 S.W.2d 639, *aff'd*, 289 Ark. 509, 715 S.W.2d 429 (1986).

Stretching this section to assume liability for part of the disability or impairment sustained by a handicapped worker while in an employer's employment relieves that employer of part of his statutory liability and grants him a windfall of subsidy; it was not the legislature's intent to give employers that type of encouragement to hire or retain handicapped or injured workers. *Second Injury Fund v. McCarver*, 17 Ark. App. 101, 704 S.W.2d 639, *aff'd*, 289 Ark. 509, 715 S.W.2d 429 (1986).

The very purpose of the Second Injury Fund is to provide relief to an employer who hires a person with prior impairment so that the employer is not to be held responsible for more disability than that caused by that workplace. *Prier Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988).

The underlying purpose of this section is to limit the employer's liability to the amount of disability or impairment suffered by the employee during his employment with that employer, and to thereby encourage hiring of the handicapped. *Weaver v. Tyson Foods*, 31 Ark. App. 147, 790 S.W.2d 442 (1990).

The Fund was created by the General Assembly to see to it that a subsequent employer does not become responsible for disability of an employee when a part of his or her condition results from an injury which occurred in previous employment with a different employer. *Hawkins Constr. Co. v. Maxell*, 325 Ark. 133, 924 S.W.2d 789 (1996).

Applicability.

Second injury compensation provisions do not apply where previous injuries had

not contributed to the final permanent total disability. *Cooper Indus. Prods., Inc. v. Worth*, 256 Ark. 394, 508 S.W.2d 59 (1974).

In order for the second injury provision to apply, it must be found that the previous injury or injuries, combined with a second injury, caused the disability complained of. *Wooten v. Mohawk Rubber Co.*, 259 Ark. 837, 536 S.W.2d 734 (1976); *Nall v. Maynard*, 271 Ark. 643, 609 S.W.2d 352 (1980).

This section did not apply to injury which occurred prior to the effective date of this section. *A.O. Smith-Inland, Inc. v. Dodd*, 15 Ark. App. 108, 690 S.W.2d 367 (1985).

The Second Injury Fund is not liable when an employee sustains a second injury while still working for the employer in whose employment he or she sustained the first injury. *McCarver v. Second Injury Fund*, 289 Ark. 509, 715 S.W.2d 429 (1986), overruled, *Nelson v. Timberline Int'l*, 332 Ark. 165, 964 S.W.2d 357 (1998).

If successive injuries in the same employment cause total and permanent disability, the employer or his or her insurance carrier is responsible to the employee for all benefits; however, if the previous disability or impairment does not arise out of the employment by the same employer, the Second Injury Fund must pay the benefits. *Riceland Foods, Inc. v. Second Injury Fund*, 289 Ark. 528, 715 S.W.2d 432 (1986), overruled, *Nelson v. Timberline Int'l*, 332 Ark. 165, 964 S.W.2d 357 (1998); *Death & Permanent Total Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (1992).

Liability of the Second Injury Fund comes into question only after three hurdles have been overcome: (1) the employee must have suffered a compensable injury at his present place of employment; (2) prior to that injury the employee must have had a permanent partial disability or impairment; and (3) the disability or impairment must have combined with the recent compensable injury to produce the current disability status. *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

Once the workers' compensation commission has made a determination of the existence of permanent partial disability, whether as a result of a hearing after the issues have been controverted or on a

hearing to approve a joint petition, the issue is not subject to reexamination in the context of the Second Injury Fund statute. *Arkansas Methodist Hosp. v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

In order to establish liability of the Second Injury Trust Fund, it is necessary to satisfy the three-part test set out in *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988). *Bussell v. Georgia-Pacific Corp.*, 48 Ark. App. 131, 891 S.W.2d 75 (1995); *Hawkins Constr. v. Maxell*, 52 Ark. App. 116, 915 S.W.2d 302 (1996), rev'd, 325 Ark. 133, 924 S.W.2d 789 (1996).

Pursuant to subdivisions (3) and (4), the Second Injury Fund may be subjected to liability if a claimant suffers from a permanent impairment, whether or not the impairment is the result of a compensable injury; it is immaterial whether or not the impairment resulted in any wage-loss disability. *Second Injury Fund v. Furman*, 60 Ark. App. 237, 961 S.W.2d 787 (1998).

Consistent with the legislative intent to encourage employers to retain employees with disabilities or impairments resulting from a prior injury, the Second Injury Fund is liable for wage-loss benefits resulting from the cumulative effect of successive injuries when the claimant sustains injuries in the same employment. *Nelson v. Timberline Int'l*, 332 Ark. 165, 964 S.W.2d 357 (1998).

Attorney's Fees.

Where Workers' Compensation Commission Second Injury Fund did not controvert claimant's entitlement to compensation, it was not responsible for an attorney's fee in any amount. *Buckner v. Sparks Regional Medical Ctr.*, 32 Ark. App. 5, 794 S.W.2d 623 (1990).

Compensation.

Employees of cleaning establishment who worked for the most part at a ranch owned by insured which was maintained primarily for advertising value were entitled to compensation. *Great Am. Indem. Co. v. Bailey*, 221 Ark. 469, 254 S.W.2d 322 (1953).

If claimant would have been able to work longer if his injuries had not occurred he is entitled to compensation. *Minor v. Poinsett Lumber & Mfg. Co.*, 235 Ark. 195, 357 S.W.2d 504 (1962).

The full commission's reversal of an award by a referee for inadequacy with direction that the claimant return to a doctor for further treatment and that the matter of the termination of the healing period and the extent of the permanent partial disability be held in abeyance was justified where the medical testimony indicated need for further treatment. *Singer Co. v. Johnston*, 243 Ark. 679, 421 S.W.2d 341 (1967).

Where the claimant sustained a compensable injury while working at one job, his compensation benefits were properly based on wages from that job rather than on the combined incomes of that job and another held by claimant. *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980).

In considering the question of Second Injury Fund liability, the claimant's former condition need not have met all elements of compensability under workers' compensation law, former condition and the recent compensable injury cannot both have occurred in the course of the employee's employment with the same employer. *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

There is no specific statutory authority providing for the total exclusion of workers' compensation benefits when a claimant is eligible for or is drawing social security benefits. *Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

Computation.

The formula used to determine Second Injury Fund liability in *Weaver v. Tyson Foods*, 31 Ark. App. 147, 790 S.W.2d 442 (1990), which involved permanent partial disability (governed by subdivisions (b)(3) and (4) of this section) is not applicable in cases involving permanent total disability (governed by subdivision (b)(5) of this section). *Jeffcoat v. Second Injury Fund*, 935 S.W.2d 309 (1996).

Evidence.

Evidence insufficient to support award from Second Injury Fund. *Arkansas Workmen's Comp. Comm'n v. Sandy*, 217 Ark. 821, 233 S.W.2d 382 (1950); *Davis v. Stearns-Rogers Constr. Co.*, 248 Ark. 344, 451 S.W.2d 469 (1970); *Gibson's Disct. Ctr. v. Bornmann*, 252 Ark. 24, 477 S.W.2d 171 (1972); *Cooper Indus. Prods., Inc. v.*

Worth, 256 Ark. 394, 508 S.W.2d 59 (1974); *Great Plains Bag Corp. v. Ray*, 267 Ark. 943, 593 S.W.2d 51 (Ct. App. 1979); *Hammer v. Intermed N.W.*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Baldwin v. Club Prods. Co.*, 270 Ark. 155, 604 S.W.2d 568 (1980); *Nall v. Maynard*, 271 Ark. 643, 609 S.W.2d 352 (1980); *Kemper Ins. Co. v. Buchheit*, 271 Ark. 458, 609 S.W.2d 660 (1980); *Osage Oil Co. v. Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985). But see *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988); *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985); *State Second Injury Fund v. Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985); *Masonite Corp. v. Mitchell*, 16 Ark. App. 209, 699 S.W.2d 409 (1985); *Second Injury Fund v. Fraser-Owens, Inc.*, 17 Ark. App. 58, 702 S.W.2d 828 (1986). But see *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

Evidence sufficient to support award from Second Injury Fund. *Dacus Casket Co. v. Hardy*, 250 Ark. 886, 467 S.W.2d 713 (1971); *Gibson's Disct. Ctr. v. Bornmann*, 252 Ark. 24, 477 S.W.2d 171 (1972); *Wooten v. Mohawk Rubber Co.*, 259 Ark. 837, 536 S.W.2d 734 (1976); *Browning's Restaurant v. Kuykendall*, 263 Ark. 374, 565 S.W.2d 33 (1978); *Springston v. Jones Truck Lines*, 268 Ark. 653, 595 S.W.2d 247 (1980); *City of Magnolia v. Caswell*, 269 Ark. 708, 600 S.W.2d 32 (1980); *Marshall v. Ouachita Hosp.*, 269 Ark. 958, 601 S.W.2d 901 (Ct. App. 1980), overruled in part, *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981); *Chicago Mill & Lumber Co. v. Greer*, 270 Ark. 672, 606 S.W.2d 72 (1980); *Little v. Delta Rice Mill, Inc.*, 11 Ark. App. 114, 667 S.W.2d 373 (1984).

In cases where the medical testimony is so uncertain that it could clearly lead the finder of fact to either of two contrary conclusions, the courts will not reverse the commission, as the substantial evidence supports whichever determination it makes; accordingly, where medical evidence was equivocal as to whether claimant's disease was aggravated by a work-related accident, the court would not disturb commission's decision that there was no aggravation of a preexisting malady. *Johnson v. Valmac Indus.*, 269 Ark. 626, 599 S.W.2d 440 (1980).

Where the employee did not experience a decrease in his capacity to earn wages as a result of either his congenital condition or the previous pelvis fracture, there was substantial evidence to support the Workers' Compensation Commission's findings that the employee did not have an "impairment" within the meaning of this section prior to the compensable injury and that the Second Injury Fund was not liable for any of the benefits which were a consequence of the compensable injury. *Del Monte Frozen Foods, Inc. v. Harmon*, 19 Ark. App. 51, 716 S.W.2d 784 (1986).

The Workers' Compensation Commission did not err in holding that worker's congenital dyslexia was not "a previous disability or impairment" which gives rise to a claim against the Second Injury Fund under this section, where the worker entered the labor market as an unskilled manual laborer, he was pursuing that employment without diminished earning capacity at the time of his injury, and there was no evidence that the claimant could not have continued in the same or similar employment at the same wage he had always earned had it not been for his injury. *Holley Enters. v. Nicholls*, 19 Ark. App. 97, 717 S.W.2d 495 (1986).

Before the fact finder may consider the final question of whether a claimant's former condition combined with a recent compensable injury to produce the current disability status, it must be determined whether the claimant's former condition constituted an "impairment." In determining whether the claimant's former condition constituted an "impairment," the question which would be posed in each case is: Is the physical quality of the claimant's former nonwork related condition such that, were all other elements of compensability present, it would be capable of supporting an award? *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

Commission's decision which found an aggravation of a prior injury, as opposed to a recurrence, was supported by substantial evidence. *Curry v. Franklin Elec.*, 32 Ark. App. 168, 798 S.W.2d 130 (1990).

Where there was strong medical testimony showing that employee's first injury did not create a physical condition which contributed to the ultimate disability, it was permissible for the Commission to consider employee's lack of wage-loss dis-

ability as some corroboration of that medical testimony. *POM, Inc. v. Taylor*, 325 Ark. 334, 925 S.W.2d 790 (1996).

The Second Injury Fund was liable for payment of wage-loss benefits where (1) all parties agreed that the claimant suffered a compensable injury, (2) the claimant was 8% permanently impaired prior to the compensable injury, and (3) the prior impairment combined with the compensable injury to produce the claimant's current disability status. *Douglas Tobacco Prods. Co. v. Gerald, Inc.*, 68 Ark. App. 304, 8 S.W.3d 39 (1999).

Fund Participation.

The insurance carrier and the employer are the parties who benefit from Second Injury Fund involvement in appropriate cases, and it should be their responsibility to join the fund where their defense is based on the theory that an initial injury is contributing to the total amount of disability following the second injury. *State, Second Injury Fund v. Mid-State Constr. Co.*, 16 Ark. App. 169, 698 S.W.2d 804 (1985).

This section does not provide any limitation on the Second Injury Fund's right to defend against a claim. *Jackson v. Circle T Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995).

Where the Second Injury Fund becomes a party to an action after the making of a stipulation, it is not bound by that stipulation. *Jackson v. Circle T Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995).

A claimant can draw wage-loss disability from the fund even if the claimant's employer did not carry workers' compensation insurance. *Second Injury Fund v. J & S Trucking*, 71 Ark. App. 218, 30 S.W.3d 112 (2000).

Impairment.

One may be impaired without being disabled; an "impairment" may or may not be work-related, meaning that it may or may not have an effect on the injured worker's ability to perform. *Hawkins Constr. Co. v. Maxell*, 325 Ark. 133, 924 S.W.2d 789 (1996).

A person who loses one eye becomes impaired but not disabled in a wage loss sense; if the person then loses the other eye, the person becomes disabled. *Hawkins Constr. Co. v. Maxell*, 325 Ark. 133, 924 S.W.2d 789 (1996).

The term "impairment" in this section includes results of work-related injuries as well as non-work-related injuries. *POM, Inc. v. Taylor*, 325 Ark. 334, 925 S.W.2d 790 (1996).

Investigation of Claim.

Filing interrogatories and participating in the taking of depositions are methods of gathering information for the investigation the fund must make in any case in which it has been made a party, and this investigation does not mean that the claim is controverted by the fund. *Buckner v. Sparks Regional Medical Ctr.*, 32 Ark. App. 5, 794 S.W.2d 623 (1990).

Knowledge.

The language in this section referring to latent conditions "which are not known to the employee or employer" requires knowledge by either the employee or the employer, but not both. *Second Injury Fund v. Yarbrough*, 19 Ark. App. 354, 721 S.W.2d 686 (1986).

Latent Condition.

"Latent condition" is not defined by statute. An injury is latent until its substantial character becomes known or until the employee knows or should reasonably be expected to be aware of the full extent and nature of his injury. *Purolator Courier v. Chancey*, 40 Ark. App. 1, 841 S.W.2d 159 (1992).

The fact that there were visible signs of the claimant's underlying disorder did not preclude a finding that the condition which disabled him was latent at the time of the injury. Until the injury, the claimant was able to perform normally, therefore the evidence supported a finding that, at the time of the injury, the full extent and nature of his childhood illness and its effect was not known to him or to his employer. *Purolator Courier v. Chancey*, 40 Ark. App. 1, 841 S.W.2d 159 (1992).

As substantial evidence failed to support a finding that the substantial character or full extent of claimant's pulmonary disease was known when he suffered the second injury, his condition was latent and did not qualify as a prior disability or impairment which would trigger Second Injury Fund liability. *Second Injury Fund v. James River Corp.*, 53 Ark. App. 204, 920 S.W.2d 869 (1996).

Liability for Second Injury.

Decision of the Arkansas Workers' Compensation Commission that the second-

injury fund had no obligation to an employee's injury was remanded for more findings of fact because although the Commission correctly found that the employee previously worked unrestricted, that single finding was inadequate to support the Commission's conclusion that the employee failed to prove that her previous disability or impairment combined with her recent compensable injury to produce her disability status; there was much testimony and evidence elicited at the hearing that was related to the combination issue. *St. Vincent Health Servs. v. Bishop*, 2010 Ark. App. 141, — S.W.3d — (2010).

—In General.

If the second injury is recurrence of the original injury, compensation therefor must be paid by the employer and insurance carrier at the time of the first injury. *Moss v. El Dorado Drilling Co.*, 237 Ark. 80, 371 S.W.2d 528 (1963).

When symptoms of an injury persist and culminate in a second disability without the intervention of a new injury, the second disability is properly classified as a recurrence of the first injury and the insurance carrier and employer at the time of the original injury remain liable. *Halstead Indus. v. Jones*, 270 Ark. 85, 603 S.W.2d 456 (Ct. App. 1980); *Allen Canning Co. v. McReynolds*, 5 Ark. App. 78, 632 S.W.2d 450 (1982).

Where the second complication is found to be natural and probable result of the first injury, the employer remains liable and only where it is found that the second episode has resulted from an independent intervening cause is that liability affected. While there may be some variance in the words used to describe the principle, there has been no departure from the basic test, i.e., whether there is a causal connection between the two episodes. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

When an accidental injury aggravates a prior one, the one in whose employ the second injury occurs is liable for all of the consequences naturally flowing from that incident; and it is only when the employee suffers merely a recurrence of a former injury without an intervening cause that the employer at the time of the initial injury is liable for the recurring disability. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

If the second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. *Home Ins. Co. v. Meeker*, 9 Ark. App. 201, 657 S.W.2d 215 (1983).

All of the logical consequences flowing from an initial injury are the responsibility of the carrier at the time of the initial incident. Where the second complication is a natural and probable result of the first injury it is deemed a recurrence and the original carrier remains liable. Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier. *Aetna Ins. Co. v. Dunlap*, 16 Ark. App. 51, 696 S.W.2d 771 (1985).

The test for liability of the Second Injury Fund is whether the prior impairment was effectively producing disability in the compensation sense (diminished earning capacity) before the accident and continued to do so afterwards. *Masonite Corp. v. Mitchell*, 16 Ark. App. 209, 699 S.W.2d 409 (1985).

The Workers' Compensation Commission did not err in finding that employee was guilty of unreasonable conduct in connection with a work-related disability where employee's failure to wear his wrist splint, resulting in a second injury, constituted an independent intervening event relieving insurer of further liability. *Broadway v. B.A.S.S.*, 41 Ark. App. 111, 848 S.W.2d 445 (1993).

In order for the Second Injury Fund to have liability, three prerequisites must be met: (1) the employee must have suffered a compensable injury at his present place of employment; (2) prior to that injury, the employee must have had a permanent partial disability or impairment; and (3) the disability or impairment must combine with the recent compensable injury to produce the current disability status. *Arkansas Hwy. & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

If the more recent injury alone would have caused claimant's current disability status, the Second Injury Fund has no liability. *Arkansas Hwy. & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

A prior condition need not cause a loss of wage-earning capacity in order to constitute an "impairment" and thereby meet the second prong of the test for Second Injury Fund liability. *Arkansas Hwy. & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

The lack of prior "disability" is not a determining factor, but the extent of one's physical abilities prior to a compensable injury is not necessarily irrelevant to the decision whether the Second Injury Fund is liable. *Arkansas Hwy. & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

Where there was evidence that although claimant sustained an injury in 1990, he had no surgery, he returned to the work force doing manual labor, and he had no problem doing his work until his injury more than two years later while working for the employer, claimant's pre-existing disability and his most recent injury did not combine to produce a greater disability than would have been caused by the last injury considered alone. *Hawkins Constr. v. Maxell*, 52 Ark. App. 116, 915 S.W.2d 302 (1996), rev'd, 325 Ark. 133, 924 S.W.2d 789 (1996).

—Apportionment.

Where injury had resulted in no impairment of worker's earning capacity, the employer and its insurance carrier when the employee sustained a later, second injury were not entitled to claim any theory of apportionment to reduce the amount that worker was entitled to receive as the first attack had resulted in no impairment of earning capacity nor was it claimed as an industrial injury. *Wilson Hargett Constr. Co. v. Holmes*, 235 Ark. 698, 361 S.W.2d 634 (1962).

Where claimant was awarded permanent partial disability to the body as a whole for previous injuries, only an injury to the same part of the body would have any effect on a subsequent permanent partial disability to the body as a whole, the previous award for the similar injury being deducted. *O.K. Processors, Inc. v. Dye*, 241 Ark. 1002, 411 S.W.2d 290 (1967).

Where the claimant had suffered two injuries to the same area, the case was remanded to the commission for a determination of the degree of disability suffered by the claimant as a result of her

first injury and for the degree of disability that would have resulted from her subsequent injury if the previous disability, if any, had not existed. *Gibson's Disct. Ctr. v. Bornmann*, 252 Ark. 24, 477 S.W.2d 171 (1972).

Where an employee accident created permanent partial disability and a second accident with another employer increased that disability, the second employer was responsible for only that portion of the disability created by the second accident. *International Paper Co. v. Remley*, 256 Ark. 7, 505 S.W.2d 219 (1974).

Apportionment does not apply unless the prior impairment was independently causing disability prior to the second injury and continues to operate as such after the accident; the fact that the prior disability was not job related and did not arise out of or in the course of a covered employment does not affect the duty to apportion. *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981).

Workers' Compensation Commission erred in holding that apportionment was not authorized on the grounds that the employee's preexisting disability resulted from a congenital abnormality and was not work related, since there is no requirement that the first injury be a compensable one before apportionment will apply and since the prior impairment was independently causing disability prior to the second injury and continued to do so after the accident. *Harrison Furn. v. Chrobak*, 2 Ark. App. 364, 620 S.W.2d 955 (1981).

While apportionment does not depend upon the preexisting disability being job related, apportionment does not apply unless the prior impairment was independently causing disability prior to the second injury and continued to do so after that injury. *Craighead Mem. Hosp. v. Honeycutt*, 5 Ark. App. 90, 633 S.W.2d 53 (1982).

Application of the doctrine of apportionment requires a finding that there was a second episode resulting from an independent intervening cause. *Aetna Ins. Co. v. Dunlap*, 16 Ark. App. 51, 696 S.W.2d 771 (1985).

In order to be apportionable under subsections (a) and (b), the condition must have been independently causing a disability prior to the second injury and continue to do so after the second injury. *State Treasurer, Second Injury Fund v.*

Coleman, 16 Ark. App. 188, 699 S.W.2d 401 (1985).

—Preexisting Condition.

A claim is compensable, without proof of unusual strain or exertion, when the claimant's ordinary work aggravates a preexisting condition and thus contributes to the injury. *Black v. Riverside Furn. Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982). Criticized by *Cox v. Nashville Livestock Com.*, 28 Ark. App. 138, 771 S.W.2d 786 (1989); *Colonial Nursing Home v. Harvey*, 9 Ark. App. 197, 657 S.W.2d 211 (1983).

A preexisting disease or infirmity of an employee does not disqualify a claim under the arising out of employment requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

While a prior condition need not have been a compensable injury, it must be independently producing some degree of disability before the second injury and continue to operate as a disability after the second injury in order for it to constitute a previous disability or impairment. *State Second Injury Fund v. Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985).

"Previous disability of impairment" does not refer to a condition which occurred while in the employment of the second-injury employer; the Second Injury Fund is not liable where all of the claimant's disability or impairment results from injuries occurring while in the employment of the same employer. *Second Injury Fund v. Riceland Foods, Inc.*, 17 Ark. App. 104, 704 S.W.2d 635 (1986), *aff'd*, 289 Ark. 528, 715 S.W.2d 432 (1986); *Second Injury Fund v. McCarver*, 17 Ark. App. 101, 704 S.W.2d 639, *aff'd*, 289 Ark. 509, 715 S.W.2d 429 (1986).

Before the Second Injury Fund is liable, one must have a preexisting condition that is independently causing a loss of earning capacity at the time of the second injury, and which continues to do so. *Second Injury Fund v. Yarbrough*, 19 Ark. App. 354, 721 S.W.2d 686 (1986).

Claimant's prior impairment must have been of a physical quality sufficient in and of itself to support an award of compensation had the elements of compensability

existed as to the cause for the impairment. It is the substantial nature of the impairment which is emphasized, and the elements of compensability, none of which may have existed as to the particular claimant, merely assist the fact finder in his determination as to whether the former condition was sufficient in degree to constitute an impairment qualifying the claimant as one of the "handicapped" for whose benefit this section was enacted. *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

When it is determined that through the combination of a preexisting condition which is not work-related and a current compensable injury the claimant has sustained a disability greater than would have resulted from either of them alone, this section provides that the claimant shall be fully compensated for his current disability, but does not provide that the Second Injury Fund shall compensate the claimant for his preexisting non-work related condition. *Weaver v. Tyson Foods*, 31 Ark. App. 147, 790 S.W.2d 442 (1990).

Claimant's pre-existing impairment did not combine with his work-related injury to produce his current disability status; claimant's current disability status was solely the result of his compensable injury, and the Second Injury Fund had no liability. *Arkansas Hwy. & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

In addressing Second Injury Fund liability, the determination of whether an employee suffered preexisting impairment in addition to any disability which resulted from a work-related injury is a factual one and is to be made by the Commission. *Chamberlain Group v. Rios*, 45 Ark. App. 144, 871 S.W.2d 595 (1994).

Where employee's preexisting diabetes did not affect his ability to work prior to his admitted compensable injury, the diabetes was not a preexisting impairment sufficient to trigger Second Injury Fund liability. *Chamberlain Group v. Rios*, 45 Ark. App. 144, 871 S.W.2d 595 (1994).

Since it is well-settled that the aggravation of a pre-existing noncompensable condition by a compensable injury is itself compensable, the commission's decision not to award compensation because there were other possible causes for claimant's condition, was erroneous. *Hubley v. Best Western-Governor's Inn*, 52 Ark. App. 226,

916 S.W.2d 143 (1996), superseded by statute as stated in, *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998). But see *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000).

Repeal of Prior Provisions.

Section 81-1313(f)(1) of the Arkansas Statutes Annotated, which was not codified in the Arkansas Code of 1987 (now codified as §§ 11-9-519 — 11-9-526), was not repealed or superseded by Acts 1981, No. 290, now codified, in part as subdivision (b)(1) of this section. *Death & Permanent Total Disability Trust Fund v. Whirlpool Corp.*, 39 Ark. App. 62, 837 S.W.2d 293 (1992).

Scheduled Injury.

Arkansas Court of Appeals, Division Four, holds that a claimant with a scheduled injury is not entitled to permanent partial disability benefits, and this applies whether the claimant is seeking benefits from an employer, an insurer, or the Arkansas Second Injury Fund. Therefore, a claimant, who lost four fingers in an accident, was unable to obtain wage-loss disability over and above the impairment rating to her hand based on a previous diagnosis of foot ulcers, even if the Fund was liable. *Crelia v. Rheem Mfg. Co.*, 99 Ark. App. 73, 257 S.W.3d 115 (2007).

Separate Injuries.

Employee's similar compensable back injury six years earlier did not combine with the second compensable back injury to produce his current disability status. *POM, Inc. v. Taylor*, 325 Ark. 334, 925 S.W.2d 790 (1996).

Wage Earning Loss.

The wage-loss factor rather than the functional or anatomical loss is controlling in disability determinations which are to be made by the commission on the basis of medical evidence, age, education, experience and other matters reasonably expected to affect the claimant's earning power. *Rooney v. Charles*, 262 Ark. 695, 560 S.W.2d 797 (1978); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Perry v. Mar-Bax Shirt Co.*, 16 Ark. App. 133, 698 S.W.2d 302 (1985).

A worker may be entitled to additional wage loss disability even though his wages remain the same or increase after

the injury. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

A claimant's nonwork related condition suffered prior to the recent compensable injury need not have involved a loss of earning capacity. *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

In determining what is an "impairment," loss of earning capacity becomes nothing more than one of the elements of compensability which, though possibly lacking in the particular case, constitutes a point of reference in determining whether the claimant's former nonwork related condition would be capable of supporting an award. *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

Prior wage-earning loss is not a prerequisite to finding that an impairment and work-related injury have "combined" to produce one's level of disability. *Arkansas Hwy. & Transp. Dep't v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

Cited: *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952). But see *Looney v. Sears, Roebuck & Co.*, 236 Ark. 868, 371 S.W.2d 6 (1963); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Abbott v. C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968); *Bibler Bros. Lumber Co. v. Allen*, 251 Ark. 593,

474 S.W.2d 116 (1971); *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971); *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978); *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (1980); *Midwest Steel Co. v. Mulanax*, 270 Ark. 914, 606 S.W.2d 606 (1980); *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983); *Sanders v. Alan White Co.*, 10 Ark. App. 322, 663 S.W.2d 939 (1984); *Crain Burton Ford Co. v. Rogers*, 12 Ark. App. 246, 674 S.W.2d 944 (1984); *C.J. Horner Co. v. Stringfellow*, 14 Ark. App. 138, 685 S.W.2d 533 (1985); *Gerber Prods. v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985); *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *General Indus. v. Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987); *Quality Serv. Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991); *Ellison v. Therma-Tru*, 66 Ark. App. 286, 989 S.W.2d 927 (1999); *Rice v. Georgia-Pacific Corp.*, 72 Ark. App. 148, 35 S.W.3d 328 (2000).

11-9-526. Compensation for disability — Refusal of employee to accept employment.

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

History. Init. Meas. 1948, No. 4, § 13, Acts 1949, p. 1420; Init. Meas. 1956, No. 1, § 2, Acts 1957; A.S.A. 1947, § 81-1313.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Acceptance of Work.
Commission's Authority.

Evidence.
Refusal Not Shown.

Construction.

The term "compensation" as used in this section refers to money benefits paid to

the injured employee for disability. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Courts strictly construe the statute. *Tyson Poultry, Inc. v. Narvaiz*, 2012 Ark. 118, — S.W.3d — (2012).

Applicability.

This section did not apply to a claimant who accepted employment and was later terminated not by his choice, but at the option of his employer. *Superior Indus. v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000).

Provisions of § 11-9-522(b) and this section did not bar an employee's wage loss claim because, although there was testimony that the employee would have been "recommended" for employment, a possible recommendation for employment was not the same as an offer of employment and the statutory bar required an actual offer of employment. *Hope Sch. Dist. v. Wilson*, 2011 Ark. App. 219, — S.W.3d — (2011).

Acceptance of Work.

Substantial evidence supported the Arkansas Workers' Compensation Commission's finding that a claimant was terminated for his inability to perform his job as a result of his injury and not for misconduct. Accepting light duty work and returning to work for one full day before returning to light duty work did not bar his claim for TTD benefits, especially since, if he had refused, his claim would have been barred under this section. *Am. Railcar Indus. v. Gramling*, 2010 Ark. App. 625, — S.W.3d — (2010).

Pursuant to this section, an employee with a knee injury who refused light duty work offered to him by his employer following surgery on the knee was not entitled to temporary total disability (TTD) benefits because, under § 11-9-521(a), the failure to return to work must have been causally related to the injury. *Gomez v. Crossland Constr. Co.*, 2011 Ark. App. 787, — S.W.3d — (2011).

Commission's Authority.

The commission is not authorized to dismiss a claim for the reason that its order to work has been violated although it may suspend payments during the period of refusal. *Paragould Laundry & Dry Cleaning Co. v. Rogers*, 210 Ark. 764, 197

S.W.2d 567 (1946) (decision under prior law).

Evidence.

Evidence supported determination that claimant had voluntarily chosen not to return to the job market and was not disabled. *King v. Farmers Liquid Fertilizer*, 267 Ark. 798, 590 S.W.2d 327 (Ct. App. 1979).

Evidence sufficient to support finding that claimant suffered a disability resulting from a condition existing prior to and at the time of his second injury. *Second Injury Fund v. Robison*, 22 Ark. App. 157, 737 S.W.2d 162 (1987).

There was substantial evidence from which the commission could determine that the claimant's refusal of the job was justifiable because the job was unsuitable. *ITT/Higbie Mfg. v. Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991).

In a workers' compensation case, a claimant's refusal to work at the light-duty jobs offered to her barred her from receiving temporary-total disability benefits that she sought, pursuant to this section. It was shown that the claimant refused to take jobs in a medical clinic, refused to work in a laundry room, and she failed to show that her prescribed medications posed a danger to the patients at the medical clinic. *Neal v. Sparks Reg'l Med. Ctr.*, 104 Ark. App. 97, 289 S.W.3d 163 (2008).

Section 11-9-520 contemplates a situation in which an employee returns to work but, because of a temporary-partial disability, is not earning the same wages as before the injury; where this section bars a claimant from receiving temporary-total-disability benefits for a designated period of time because of a refusal to accept suitable employment that is within the claimant's capacity to perform, the same rationale applies to bar the claimant from receiving temporary-partial disability. Therefore, in a case where a claimant refused to accept work within her capability at a medical clinic or in a laundry room after she suffered a compensable shoulder and neck injury, she was unable to receive temporary-partial disability. *Neal v. Sparks Reg'l Med. Ctr.*, 104 Ark. App. 97, 289 S.W.3d 163 (2008).

There was substantial evidence to deny an employee's claim for temporary-total disability benefits on the basis that he

refused suitable employment because an administrative law judge (ALJ) determined that the testimony of the employer's executive director that she offered the employee a job within his restrictions, and he refused the job, that such refusal was unjustified, and that such refusal barred his claim for temporary-total disability benefits; the Arkansas Workers' Compensation Commission affirmed and adopted the ALJ's findings, and the court of appeals was bound by the Commission's credibility decisions. *Johnson v. Abilities Unlimited, Inc.*, 2009 Ark. App. 866, — S.W.3d — (2009).

Decision of the Arkansas Workers' Compensation Commission to award an employee benefits for medical treatment and temporary total disability was supported by substantial evidence because the Commission found that the job of soil-coding, which was light duty work at the employee's same wages, was not actually available since there was not enough soil-coding work to be done; the Commission based its finding on the testimony of the employee's supervisor. *Mack-Reynolds Appraisal Co. v. Morton*, 2010 Ark. App. 142, — S.W.3d — (2010).

Finding against the employee in his workers' compensation action was appropriate under § 11-9-102(12) and this section because there was substantial evidence to support the finding that the employee failed to avail himself of the opportunity to work and that he was not entitled to temporary disability after May 8, 2008. A release to work stated that the employee be provided jobs within his sedentary restrictions and both the employee and his manager testified that he left that work with various complaints of inability to perform. *Watts v. Sears Roebuck & Co.*, 2011 Ark. App. 529, — S.W.3d — (2011).

Refusal Not Shown.

Although former employer suggested that employee might be rehired if she reapplied for a light-duty job, this does not constitute an offer of employment as contemplated by this section; because the employee was never offered a job, there was no substantial evidence to support the commission's findings that the employee unjustifiably refused employment suitable to her capacity. *Barnette v. Allen Canning Co.*, 49 Ark. App. 61, 896 S.W.2d 444 (1995).

Workers' compensation claimant was not statutorily barred from receiving temporary total or partial disability, under § 11-9-521, because he undisputedly remained in his healing period and continued to work light duty and because there was no substantial evidence of unjustifiable refusal to work, such that this section would have been triggered. *Walker v. Cooper Auto.*, — Ark. App. —, 289 S.W.3d 184 (2008).

Employee stated that he attempted to do the work, but was sent home, and if the employee's testimony was accepted, he never refused suitable work, and if a co-worker's testimony was accepted, then at best any refusal to do the work was justifiable given the employee's inability to do the work. *United Farms, Inc. v. Gist*, 2009 Ark. App. 717, — S.W.3d — (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 998 (Dec. 9, 2009), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 94 (Feb. 12, 2010).

In holding that an employee was entitled to additional TTD benefits, wage loss benefits, and attorney fees, the Arkansas Workers' Compensation Commission correctly interpreted the statute; the employee's misconduct, which resulted in termination, did not amount to a refusal of suitable employment. *Tyson Poultry, Inc. v. Narvaiz*, 2012 Ark. 118, — S.W.3d — (2012).

Cited: *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952); *McGehee Hatchery Co. v. Gunter*, 234 Ark. 113, 350 S.W.2d 608 (1961); *Abbott v. C. H. Leavell & Co.*, 244 Ark. 544, 426 S.W.2d 166 (1968); *Bibler Bros. Lumber Co. v. Allen*, 251 Ark. 593, 474 S.W.2d 116 (1971); *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971); *Coleman's Bar-B-Que v. Fuller*, 262 Ark. 645, 559 S.W.2d 714 (1978); *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Hammer v. Intermed N.W.*, 270 Ark. 262, 603 S.W.2d 913 (1980); *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (1980); *Midwest Steel Co. v. Mulanax*, 270 Ark. 914, 606 S.W.2d 606 (1980); *Mountain Valley Superette, Inc. v. Bottorff*, 4 Ark. App. 251, 629 S.W.2d 320 (1982); *Vann v. Dow Chem. Co.*, 561 F. Supp. 141 (W.D. Ark. 1983); *Crain Burton Ford Co. v.*

Rogers, 12 Ark. App. 246, 674 S.W.2d 944 (1984); C.J. Horner Co. v. Stringfellow, 14 Ark. App. 138, 685 S.W.2d 533 (1985); Gerber Prods. v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985); Franklin Col-
lier Farms v. Chapple, 18 Ark. App. 200, 712 S.W.2d 334 (1986); General Indus. v. Gibson, 22 Ark. App. 217, 738 S.W.2d 104 (1987).

11-9-527. Compensation for death.

(a) **FUNERAL EXPENSES.** If death results from an injury occurring on or after July 1, 1993, the employer shall pay the actual funeral expenses, not exceeding the sum of six thousand dollars (\$6,000).

(b) **TIME OF DEATH.** If death does not result within one (1) year from the date of the accident or within the first three (3) years of the period for compensation payments fixed by the compensation order, a rebuttable presumption shall arise that the death did not result from the injury.

(c) **BENEFICIARIES — AMOUNTS.** Subject to the limitations as set out in §§ 11-9-501 — 11-9-506, compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee in the following percentage of the average weekly wage of the employee and in the following order of preference:

(1)(A)(i) To the widow if there is no child, thirty-five percent (35%), and the compensation shall be paid until her death or remarriage.

(ii) However, the widow shall establish, in fact, some dependency upon the deceased employee before she will be entitled to benefits as provided in this section;

(B)(i) To the widower if there is no child, thirty-five percent (35%), and the compensation shall be paid until his death or remarriage.

(ii) However, the widower shall establish, in fact, some dependency upon the deceased employee before he will be entitled to benefits as provided in this section;

(2) To the widow or widower if there is a child, the compensation payable under subdivision (c)(1) of this section and fifteen percent (15%) on account of each child;

(3)(A) To one (1) child if there is no widow or widower, fifty percent (50%).

(B) If more than one (1) child, and there is no widow or widower, fifteen percent (15%) for each child, and in addition thereto, thirty-five percent (35%) to the children as a class, to be divided equally among them;

(4) To the parents, twenty-five percent (25%) each;

(5) To brothers, sisters, grandchildren, and grandparents, fifteen percent (15%) each.

(d) **TERMINATIONS OF DEPENDENCE.** (1) In the event the widow remarries before full and complete payment to her of the benefits provided in subsection (c) of this section, there shall be paid to her a lump sum equal to compensation for one hundred four (104) weeks, subject to the limitation set out in §§ 11-9-501 — 11-9-506.

(2) A physically or mentally incapacitated child, grandchild, brother, or sister shall be entitled to compensation as a dependent of the

deceased employee without regard to age or marital status, but if physically or mentally capacitated to earn a livelihood, dependency shall terminate with the attainment of eighteen (18) years of age or upon marriage. However, benefits to an otherwise eligible child shall not terminate at the age of eighteen (18) years provided the child is a full-time student who has not attained the age of twenty-five (25) years.

(e) **APPORTIONMENT OF BENEFITS.** Where, because of the limitation in subsection (c) of this section, a person or class of persons cannot receive the percentage of compensation specified as payable to or on account of the person or class, there shall be available to the person or class that proportion of the percentage which, when added to the total percentage payable to all persons having priority or preference, will not exceed a total of sixty-five percent (65%), which proportion shall be paid:

(1) To that person; or

(2) To that class in equal shares unless the Workers' Compensation Commission determines otherwise in accordance with the provisions of subsection (f) of this section.

(f) **DETERMINATION OF BENEFICIARIES WITHIN CLASS.** If the commission determines that payments in accordance with subdivision (e)(2) of this section would provide no substantial benefit to any person of the class, it may provide for the payment of the compensation to the persons within the class whom it considers will be most benefited by the payment.

(g) **CESSATION OF COMPENSATION TO PART.** Upon the cessation of compensation under this section to or on account of any person, the compensation of the remaining persons entitled to compensation for the unexpired part of the period during which their compensation is payable shall be that which the persons would have received if they had been the only persons entitled to compensation at the time of the decedent's death.

(h) **DETERMINATION OF DEPENDENCY.** All questions of dependency shall be determined as of the time of the injury.

(i) **PARTIAL DEPENDENCY.** (1) If the employee leaves dependents who are only partially dependent upon his or her earnings for support at the time of injury, the compensation payable for partial dependency shall be in the proportion that the partial dependency bears to total dependency.

(2) In any claim for partial dependency where the average weekly contributions for support were not such as to entitle all dependents to compensation in the aggregate sum of seven dollars (\$7.00) per week, the dependents shall receive compensation for a period not to exceed four hundred fifty (450) weeks in an amount not to exceed the amount of average weekly contributions of the deceased employee for the support of the dependents.

History. Init. Meas. 1948, No. 4, § 15, Acts 1949, p. 1420; Acts 1961, No. 479, § 1; Init. Meas. 1968, No. 1, § 4, Acts 1969; Acts 1975 (Extended Sess., 1976), No. 1227, §§ 12, 13; 1981, No. 290, § 5;

1985, No. 842, § 1; 1986 (2nd Ex. Sess.), No. 10, § 6; A.S.A. 1947, § 81-1315; reen. Acts 1987, No. 1015, §§ 12, 13; Acts 1993, No. 796, § 25.

A.C.R.C. Notes. Part of this section

was reenacted by Acts 1987, No. 1015, §§ 12, 13. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Acts 2001, No. 1757, § 9, provided, in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

Ark. L. Rev. Workmen's Compensation — Common Law Marriage, 3 Ark. L. Rev. 487.

The Effect of Void and Voidable Marriages in Arkansas, 10 Ark. L. Rev. 188.

U. Ark. Little Rock L.J. Karber, Survey of Arkansas Law: Workers' Compensation, 2 U. Ark. Little Rock L.J. 294.

Survey—Workers' Compensation, 11 U. Ark. Little Rock L.J. 269.

CASE NOTES

ANALYSIS

Construction.

Purpose.

Applicability.

Beneficiaries.

—Amounts.

—Child.

—Dependents.

—Parent.

—Partial Dependency.

—Sibling.

—Spouse.

Benefits Awarded.

Causal Connection.

Employment Services.

Funeral Expenses.

Legislative Intent.

Res Judicata.

Terminations of Dependence.

—Remarriage.

Time of Death.

"Wholly and Dependent."

Construction.

Failure to grant retroactive application of the 1976 amendment to subsection (d) to child who had received compensation did not deny his right to equal protection. *Park v. Weyerhaeuser Co.*, 262 Ark. 668, 560 S.W.2d 226 (1978) (decision prior to 1976 amendment).

The section was severable and the offending words "during the continuance of his incapacity or" were excised from it. *Swafford v. Tyson Foods, Inc.*, 2 Ark. App. 343, 621 S.W.2d 862 (1981) (decision prior to 1981 amendment).

Provisions are to be construed liberally in favor of the claimant. *Arkansas Vin-*

egar Co. v. Ashby, 294 Ark. 412, 743 S.W.2d 798 (1988); *City of Fort Smith v. Tate*, 38 Ark. App. 172, 832 S.W.2d 262 (1992), *aff'd*, 311 Ark. 405, 844 S.W.2d 356 (Ark. 1993).

The "full and complete payment" language contained in subdivision (d)(1), which was inadvertently left in from a time when it had some relevance is now meaningless surplusage. *Ft. Smith v. Tate*, 311 Ark. 405, 844 S.W.2d 356 (Ark. 1993).

Prior case law dealing with dependents' benefits was not in conflict with the 1993 amendment of this section and, therefore, still controlled after that date. *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998).

Purpose.

With respect to § 11-9-102 and this section, it was the legislature's intent that to provide compensation for the death of an employee and to make compensation available equally for a widow and widower would be more consistent with the legislative purpose than to exclude widows; thus, the employer could not successfully argue that deletion of the unconstitutional portions of these sections was not the proper way to equalize treatment for widows and widowers. *Russell v. International Paper Co.*, 2 Ark. App. 355, 621 S.W.2d 867 (1981) (decision prior to 1981 amendment).

Applicability.

The minimum amount set forth in the section was not intended to apply to a case in which the calculation of compensation

for partial dependency produces an award of less than the minimum. *Vines v. Arkansas Kraft Corp.*, 247 Ark. 573, 446 S.W.2d 669 (1969).

The 1976 amendment to subsection (d) would not be applied retroactively to a child who received compensation, under the preexisting subsection, only until his eighteenth birthday. *Park v. Weyerhaeuser Co.*, 262 Ark. 668, 560 S.W.2d 226 (1978).

Beneficiaries.

The right of a widow to receive 35 percent of the average weekly wages of her deceased husband was prior to all claims; in addition thereto, where she qualified under former law she was entitled to an additional compensation for each minor child. *Gunnells v. Gunnells*, 203 Ark. 632, 158 S.W.2d 54 (1942) (decision under prior law).

Denial of dependency benefits to the deceased husband's son was appropriate pursuant to subsection (c) of these section, because there was no evidence that at the time of his father's death, the son had a reasonable expectation of support from him. The son was a frozen embryo at that time and was not born until approximately two years after his father's death. *Finley v. Farm Cat, Inc.*, 103 Ark. App. 292, 288 S.W.3d 685 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 464 (Apr. 9, 2009).

Survivor benefits were properly awarded to a deceased employee's minor children in Mexico under subsection (c) of this section after the employee was involved in a fatal workplace accident in the U.S. because the employee's children were wholly and actually dependent upon him, even though his wife testified that she never expected to see him again. *Death & Permanent Total Disability Trust Fund v. Rodriguez*, 104 Ark. App. 375, 292 S.W.3d 827 (2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 445 (May 7, 2009).

Dependent benefits were properly awarded to a deceased employee's parents under this section as: (1) the decedent sent the parents money regularly from the United States while he was working here, and had supported them since 1990 when he worked in Mexico; (2) the parents testified that the money was critical to them, and that they received no other money

from family members; and (3) the money-transfer records were made out to the mother, but she took care of household bills in cash and gave the father money as needed. *White Oak Constr. Co. v. Olvera*, 2011 Ark. App. 682, — S.W.3d — (2011).

Both of a deceased employee's parents were properly awarded dependent benefits under this section as this section and § 11-9-111 had to be read together to understand the Arkansas legislature's intent, and the appellate court was not convinced that by the use of the word "or" to separate the words father and mother in § 11-9-111, the legislature intended to render the award of benefits to each parent provided by this section void. *White Oak Constr. Co. v. Olvera*, 2011 Ark. App. 682, — S.W.3d — (2011).

Deceased employee's parents were properly awarded dependent benefits under this section as the one-year period in § 11-9-111 would have been July 2006 through July 2007, and the testimony presented by his parents, coupled with a portion of the records of money transfers (July 3, 2006 through July 25, 2007), supported the determination that the decedent provided support for one year prior to the date of his death. *White Oak Constr. Co. v. Olvera*, 2011 Ark. App. 682, — S.W.3d — (2011).

—Amounts.

Where an employee's death arose out of his employment and he left only parents, brothers, and sisters, commission properly made award to the family of the deceased, expense award to the family of the deceased, and an award to the claimants' attorney for \$100. *Brown v. W.H. Patterson Constr. Co.*, 235 Ark. 465, 361 S.W.2d 13 (1962).

In case of a deceased workman who left surviving him a widow and two minor children by a prior marriage, the widow did not have priority, but shared priority with the children, and should receive a proportionate amount of the maximum weekly benefit. *Gary McJunkin Trucking Co. v. Byars*, 258 Ark. 387, 525 S.W.2d 662 (1975).

The commission erred in holding that a dependent widow and three children can recover 80% of the deceased employee's average weekly wage since this exceeds 66⅔% of the deceased's average weekly wage; the amounts set out in this section

are subject to the maximum limitations as set forth in § 11-9-501(b). *Mecco Seed Co. v. London*, 47 Ark. App. 121, 886 S.W.2d 882 (1994).

—Child.

Child held to be dependent on deceased parent and, therefore, entitled to benefits. *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979); *Doyle's Concrete Finishers v. Moppin*, 267 Ark. 874, 596 S.W.2d 1 (Ct. App. 1979); *Continental Ins. Co. v. Richard*, 268 Ark. 671, 596 S.W.2d 332 (Ct. App. 1980); *Hunter Mem. United Methodist Church v. Millirons*, 268 Ark. 975, 597 S.W.2d 845 (Ct. App. 1980); *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 230, 615 S.W.2d 380 (1981).

Evidence insufficient to establish that claimant was a stepchild of, or was wholly and actually dependent upon, decedent. *Bankston v. Prime W. Corp.*, 271 Ark. 727, 610 S.W.2d 586 (1981).

Although children of decedent lived with their mother, who did not receive formal child support, children were found to be entitled to benefits under this section. *Lawhon Farm Servs. v. Brown*, 60 Ark. App. 64, 958 S.W.2d 538 (1997), *aff'd*, 335 Ark. 272, 984 S.W.2d 1 (1998).

—Dependents.

Prior events and all circumstances are to be considered in determination of the relation of dependency, since a temporary situation is not controlling. *Nolen v. Wortz Biscuit Co.*, 210 Ark. 446, 196 S.W.2d 899 (1946) (decision under prior law).

One is a dependent under the act if he relies for support on employee in whole or in part. *E.H. Noel Coal Co. v. Grilc*, 215 Ark. 430, 221 S.W.2d 49 (1949) (decision under prior law).

Dependency is determined as of the time of the injury. *Sherwin-Williams Co. v. Yeager*, 219 Ark. 20, 239 S.W.2d 1019 (1951) (decision under prior law).

The addition of the word "actually" in subsection (c) was intended to change what amounted to a conclusive presumption of dependency under prior cases; it follows that when the widow and child were not living with the employee at the time of his death, there must be some showing of actual dependency. *Roach Mfg. Co. v. Cole*, 265 Ark. 908, 582 S.W.2d 268 (1979).

For the purposes of determining eligibility for benefits under this section, de-

pendency is a question of fact as opposed to a question of law. *Doyle's Concrete Finishers v. Moppin*, 267 Ark. 874, 596 S.W.2d 1 (Ct. App. 1979); *Hunter Mem. United Methodist Church v. Millirons*, 268 Ark. 975, 597 S.W.2d 845 (Ct. App. 1980); *Pinecrest Mem. Park v. Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983).

Persons who are ordinarily recognized in law as dependents, including a wife and child, and to whom the employee owes a duty of support are "wholly dependent" and establishing whether they are "actually dependent" under subsection (c) does not require total dependency, but rather a showing of actual support or a reasonable expectation of support. *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 230, 615 S.W.2d 380 (1981).

A factor to be considered in determining dependency is the claimant's reasonable expectation of future support. *Williams v. Cypress Creek Drainage*, 5 Ark. App. 256, 635 S.W.2d 282 (1982).

Where an administrative law judge, in denying dependency benefits to the decedent's mother, took his definition of the word "dependent" from a popular dictionary instead of this chapter and the appellate cases which have construed and interpreted this chapter, and where the commission specifically stated that it adopted the law judge's opinion as its own, the decision appealed from was not based upon the law and had to be remanded. *Williams v. Cypress Creek Drainage*, 5 Ark. App. 256, 635 S.W.2d 282 (1982).

While the support being furnished at the time of the worker's injury is obviously important in determining dependency benefits, conditions prior to the injury should also be considered; a reasonable period of time should be used, as dependency is not to be controlled by an unusual temporary situation. *Williams v. Cypress Creek Drainage*, 5 Ark. App. 256, 635 S.W.2d 282 (1982).

In situations where the surviving spouse or child is living apart from the deceased at the time of his death, the test of wholly dependent is met by proof of that legal status and actually dependent does not require a showing of total dependence, rather a finding of some measure of actual support or a reasonable expectation of it will suffice. *Pinecrest Mem. Park v. Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983).

Dependency of a stepchild is not a question of law, but a fact issue to be determined by the circumstances existing when the compensable injury occurs; it is based on proof of either actual support from the deceased employee, or a showing of a reasonable expectation of support where there is evidence that the stepchild is being actually supported by her natural parent, or where she has a right to expect support from the natural parent even if it is not actually provided. *Hoskins v. Rogers Cold Storage*, 52 Ark. App. 219, 916 S.W.2d 136 (1996).

This section cannot be interpreted to mean that a minor child would never be entitled to the death benefits specified in subsection (c)(3) if the parents were divorced and the child received any support whatever from the surviving parent. *Lawhon Farm Servs. v. Brown*, 335 Ark. 272, 984 S.W.2d 1 (1998).

Where decedent-claimant acknowledged both his sons, visited with or maintained telephone contact with them, and contributed, albeit sporadically, to their welfare and support, they were dependents entitled to workers' compensation death benefits; the fact that the boys' mothers did not secure child-support payments from the decedent-claimant did not mean that the boys no longer had any reasonable expectation of support. *Fordyce Concrete v. Garth*, 84 Ark. App. 256, 139 S.W.3d 154 (2003).

—Parent.

Parents held dependent on deceased child and entitled to benefits. *E.H. Noel Coal Co. v. Grilc*, 215 Ark. 430, 221 S.W.2d 49 (1949) (decision under prior law).

Although father asserted his common law right to his child's earnings, it did not preclude the father from the possibility of being a dependent under former Workers' Compensation Act upon the death of the minor son. *Kimpel v. Garland Anthony Lumber Co.*, 216 Ark. 788, 227 S.W.2d 932 (1950) (decision under prior law).

Parents held not dependent on deceased child and not entitled to benefits. *Sherwin-Williams Co. v. Yeager*, 219 Ark. 20, 239 S.W.2d 1019 (1951) (decision under prior law); *Rowe v. Druyvesteyn Constr. Co.*, 253 Ark. 63, 484 S.W.2d 513 (1972).

In determining whether decedent's mother was his dependent at the time of his death, it would be appropriate to con-

sider the amount of any contribution the decedent made to his mother's support in the light of the amount of any contribution she made to his support. *Williams v. Cypress Creek Drainage*, 5 Ark. App. 256, 635 S.W.2d 282 (1982).

—Partial Dependency.

Partial dependency is all that is necessary to establish a claim. *Kimpel v. Garland Anthony Lumber Co.*, 216 Ark. 788, 227 S.W.2d 932 (1950) (decision under prior law).

Evidence supported the finding that there was no partial dependency. *Pufahl v. Tamak Gas Prods. Co.*, 238 Ark. 895, 385 S.W.2d 640 (1965); *Smith v. Farm Serv. Coop.*, 244 Ark. 119, 424 S.W.2d 147 (1968).

Award reduced to reflect partial, rather than complete, dependency. *Vines v. Arkansas Kraft Corp.*, 247 Ark. 573, 446 S.W.2d 669 (1969).

Whether or not a minor child, not living with one of his parents and receiving only a part of his support therefrom, is subject to the partial dependency benefits of this section is a fact question to be determined in light of surrounding circumstances, since the addition of the word "actually" in subsection (c) means that there is no longer a conclusive presumption of the dependency of a child. *Doyle's Concrete Finishers v. Moppin*, 268 Ark. 167, 594 S.W.2d 243 (1980).

Evidence sufficient to support award of partial dependency benefits. *Russell v. International Paper Co.*, 2 Ark. App. 355, 621 S.W.2d 867 (1981).

In determining whether actual dependency exists, the commission need only find some dependency upon the deceased employee to entitle widow to the maximum benefits provided for in the compensation law; the fact that the husband was not the sole support of his wife does not subject her to the section of the compensation law providing benefits for partial dependency. *Pinecrest Mem. Park v. Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983).

—Sibling.

Giving of small gifts from time to time to a brother does not make the brother a dependent. *Kimpel v. Garland Anthony Lumber Co.*, 216 Ark. 788, 227 S.W.2d 932 (1950) (decision under prior law).

Sister held not dependent on deceased brother. *Sherwin-Williams Co. v. Yeager*, 219 Ark. 20, 239 S.W.2d 1019 (1951) (decision under prior law).

—Spouse.

Benefits denied on the grounds that the applicant was not the wife of the deceased. *Orsburn v. Graves*, 213 Ark. 727, 210 S.W.2d 496 (1948) (decision under prior law).

Spouse held not dependent on decedent and not entitled to benefits. *Spratlin v. Evans*, 260 Ark. 49, 538 S.W.2d 527 (1976); *Flowers v. Southern Rd. Bldrs.*, 268 Ark. 692, 594 S.W.2d 865 (1980).

Where a widower was dependent, but not incapacitated at the time of his wife's death, he was not entitled to dependency death benefits. *Hunter Mem. United Methodist Church v. Millirons*, 268 Ark. 975, 597 S.W.2d 845 (Ct. App. 1980).

A showing of actual dependency does not require proof that without the husband's contribution wife would lack the necessities of life, but only that the decedent's contributions were relied upon by the claimant to maintain her accustomed mode of living. *Pinecrest Mem. Park v. Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983).

Evidence sufficient to show that loss of husband's wages detrimentally affected wife's station in life supported a finding of fact of some dependency upon him entitling her to maximum benefits under subsection (c). *Pinecrest Mem. Park v. Miller*, 7 Ark. App. 185, 646 S.W.2d 33 (1983).

When the widow is not living with the employee at the time of his death, there must be some showing of actual dependency, which does not require a showing of total dependence, but of some measure of actual support or a reasonable expectation of it. *Robinson v. Ed Williams Constr. Co.*, 38 Ark. App. 90, 828 S.W.2d 860 (1992).

Benefits Awarded.

Deceased worker's statutory beneficiaries were entitled to recover workers' compensation benefits under this section because a compensable injury was suffered under § 11-9-102(4)(A)(i) when the worker died in a fire in her living quarters at a hotel where she was employed, even though she was off-duty at the time. Under the increased-risk doctrine for resi-

dential employees, the worker's fatal injury was compensable as a residential employee who indirectly advanced the interests of her employer. *Jivan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007).

Causal Connection.

Evidence insufficient to establish causal connection between death and an injury arising out of employment. *French v. Jonesboro Pub. Schs.*, 233 Ark. 879, 349 S.W.2d 670 (1961); *Treadway v. Riceland Foods*, 268 Ark. 658, 594 S.W.2d 861 (Ct. App. 1980).

Evidence sufficient to establish causal connection between work-related injury and death and to support award of benefits. *Exxon Corp. v. Fleming*, 253 Ark. 798, 489 S.W.2d 766 (1973); *Boswell v. Davis*, 268 Ark. 662, 595 S.W.2d 942 (Ct. App. 1980).

Employment Services.

Workers' compensation death benefits under § 11-9-527 were not awarded to a decedent's beneficiaries because the decedent was not performing employment services under § 11-9-102(4)(B)(iii) when she was killed in a fire at a hotel where she worked, since she was attending to her own personal needs in her residence. The fact that she was on-call did not change the decision. *Economy Inn & Suites v. Jivan*, 97 Ark. App. 115, 253 S.W.3d 4 (2007), rev'd, *Jivan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007).

Funeral Expenses.

Lump sum settlement under § 11-9-804 will not preclude payment of funeral expenses. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Where parents of the deceased minor were not wholly or partially dependent upon him for their support, they were not entitled to recover funeral expenses. *Rowe v. Druyvesteyn Constr. Co.*, 253 Ark. 63, 484 S.W.2d 513 (1972).

Legislative Intent.

Because the Seventy-Ninth General Assembly made no substantive changes to this section in 1993, and did not specifically annul prior case law construing it, the prior case law interpreting "wholly and actually dependent" is not contrary to, or in conflict with, the legislative intent. *Lawhon Farm Servs. v. Brown*, 60

Ark. App. 64, 958 S.W.2d 538 (1997), *aff'd*, 335 Ark. 272, 984 S.W.2d 1 (1998).

Res Judicata.

If an employee dies as a result of the disability for which he has been awarded compensation, the cause of the disability is *res judicata*. *Triebisch v. Athletic Mining & Smelting Co.*, 225 Ark. 199, 280 S.W.2d 719 (1955).

Terminations of Dependence.

Because the limit on an employer's or insurance carrier's liability in § 11-9-502(b) applied only to weekly benefits, they were responsible for the remarriage benefit described in subdivision (d)(1) of this section, even after the \$75,000 cap was reached. *Ark. Elec. Co-Op Corp. v. Death & Permanent Total Disability Trust Fund*, 2012 Ark. App. 13, — S.W.3d — (2012).

—Remarriage.

Provision that a widow is to receive a sum "equal to" 104 times the weekly benefits she had been receiving upon her remarriage is an additional benefit to compensate the widow for the loss of future weekly benefits occasioned by her remarriage. *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987), *aff'd*, 294 Ark. 412, 743 S.W.2d 798 (1988).

Lump-sum payment upon widow's remarriage is not to be treated as an advance of weekly benefits. *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987), *aff'd*, 294 Ark. 412, 743 S.W.2d 798 (1988).

When a worker's death arises out of his employment and his widow subsequently remarries and receives in one lump sum payment equal to 104 weeks compensation, the increase in benefits payable to her children on her remarriage becomes due immediately and is not postponed until the end of the 104 weeks following the remarriage. Reference to 104 weeks contained in subsection (d) was merely intended to serve as a basis by which to determine the amount of the sum to be paid to a widow upon her remarriage. *Ashby v. Arkansas Vinegar Co.*, 22 Ark. App. 167, 737 S.W.2d 177 (1987), *aff'd*, 294 Ark. 412, 743 S.W.2d 798 (1988).

Worker's compensation carrier was not entitled to "credit" the lump sum payment to the widow against periodic payments

due the remaining dependents. Workers' Compensation Commission improperly denied the decedent's dependent children an increase in benefits upon the remarriage of their mother; upon remarriage of widow, remaining dependents are entitled to compensation in the amount they would have received had they been only persons entitled to benefits upon death of their father. *Arkansas Vinegar Co. v. Ashby*, 294 Ark. 412, 743 S.W.2d 798 (1988).

The obvious purpose of the lump sum benefit provision upon remarriage is to lessen the disincentive to remarry that would be inherent in a flat cutoff of dependency benefits. This disincentive for marriage does not cease to exist when the employer reaches his maximum liability in weekly benefits; it continues indefinitely because the widow continues to receive benefits from the fund. Therefore, the need for the reduction of the disincentive, in the form of a lump sum payment, is still needed even after the employer reaches his maximum liability. *City of Fort Smith v. Tate*, 38 Ark. App. 172, 832 S.W.2d 262 (1992), *aff'd*, 311 Ark. 405, 844 S.W.2d 356 (Ark. 1993).

Allowing a widow to receive the lump sum payment at the time she is remarried, regardless of whether the employer or carrier has reached its maximum liability in weekly benefits, is the only interpretation of the statute that is consistent with the plain language of the statute, the history of the provisions in question, and the purposes underlying these provisions. It appears that the "full and complete payment" language, in subdivision (d)(1), was inadvertently left in from a time when it had some relevance and, in light of the delimitation on a widow's weekly benefits, it is now meaningless surplusage. *City of Fort Smith v. Tate*, 38 Ark. App. 172, 832 S.W.2d 262 (1992), *aff'd*, 311 Ark. 405, 844 S.W.2d 356 (Ark. 1993).

The limit on an employer or carrier's liability under § 11-9-502 applies only to weekly benefits; the employer or carrier is still responsible for any benefits in addition to weekly compensation to which the claimant is entitled. It is therefore not inconsistent with the limitations on liability found in § 11-9-502 to require the employer or carrier to pay the lump sum benefit under subdivision (d)(1). *City of Fort Smith v. Tate*, 38 Ark. App. 172, 832

S.W.2d 262 (1992), *aff'd*, 311 Ark. 405, 844 S.W.2d 356 (Ark. 1993).

Time of Death.

Fact that employee died more than three years after an injury did not prevent a recovery for death benefits, the statutory presumption that death did not result from the injury being rebuttable. *Bell v. Batesville White Lime Co.*, 217 Ark. 379, 230 S.W.2d 643 (1950) (decision under prior law).

"Wholly and Dependent."

Substantial evidence supported the Arkansas Workers' Compensation Commission's finding that the decedent's son was "wholly and actually dependent" upon the decedent at the time of his death; although he was not listed as the father on the son's birth certificate, the decedent acknowledged the son as his son beginning at the time of his birth and contributed sporadic child-support to the mother for the child's support until his death. *Hicks v. Bates*, 104 Ark. App. 348, 292 S.W.3d 850 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 717 (Mar. 18, 2009), review denied,

— Ark. —, — S.W.3d —, 2009 Ark. LEXIS 487 (June 4, 2009).

Cited: *Cole v. Hendry Corp.*, 230 Ark. 100, 321 S.W.2d 377 (1959); *Ellis v. Ellis*, 251 Ark. 431, 472 S.W.2d 703 (1971); *Maryland Cas. Co. v. Rowe*, 256 Ark. 221, 506 S.W.2d 569 (1974); *American Can Co. v. Pettyjohn*, 258 Ark. 98, 522 S.W.2d 358 (1975); *Roberts v. Smith Furn. & Appliance Co.*, 263 Ark. 869, 567 S.W.2d 947 (1978); *Hawthorne v. Davis*, 268 Ark. 131, 594 S.W.2d 844 (1980); *Swafford v. Tyson Foods, Inc.*, 1 Ark. App. 214, 614 S.W.2d 244 (1981); *Black v. Riverside Furn. Co.*, 6 Ark. App. 370, 642 S.W.2d 338 (1982); *Climer v. Drake's Backhoe*, 7 Ark. App. 148, 644 S.W.2d 637 (1983); *Hill v. CGR Medical Corp.*, 9 Ark. App. 334, 660 S.W.2d 171 (1983); *Farm Air Corp. v. Reader*, 11 Ark. App. 72, 666 S.W.2d 717 (1984); *In re Covey*, 1984 Bankr. LEXIS 6408, 36 B.R. 696 (Bankr. W.D. Ark. 1984); *McCoy on behalf of McCoy v. Logging*, 21 Ark. App. 68, 728 S.W.2d 520 (1987); *Arkansas Vinegar Co. v. Ashby*, 294 Ark. 412, 743 S.W.2d 798 (1988); *Death & Permanent Total Disability Trust Fund v. Hempstead County*, 32 Ark. App. 36, 796 S.W.2d 351 (1990).

11-9-528. Employer records.

(a) Every employer shall keep a record with respect to any injury to an employee.

(b) The record shall contain such information of disability or death with respect to the injury as the Workers' Compensation Commission may by rule or regulation require.

(c) The record shall be available for inspection by the commission or by any state authority at such time and under such conditions as the commission may by rule or regulation prescribe.

History. Init. Meas. 1948, No. 4, § 33, Acts 1949, p. 1420; A.S.A. 1947, § 81-1333.

CASE NOTES

Cited: *Little v. Smith*, 223 Ark. 601, 267 S.W.2d 511 (1954); *Ethridge v. Alex-*

ander Brown & Associates, 258 Ark. 444, 527 S.W.2d 591 (1975).

11-9-529. Employer reports.

(a) Within ten (10) days after the date of receipt of notice or of knowledge of injury or death, the employer shall send to the Workers' Compensation Commission a report setting forth:

- (1) The name, address, and business of the employer;
- (2) The name, address, and occupation of the employee;
- (3) The cause and nature of the injury or death;
- (4) The year, month, day, and hour when, and the particular locality where, the injury or death occurred; and

- (5) Such other information as the commission may require.

(b) Additional reports with respect to the injury and of the condition of the employee shall be sent by the employer to the commission at such time and in such manner as the commission may prescribe.

(c) Any report provided for in subsection (a) or (b) of this section shall not be evidence of any fact stated in the report in any proceeding with respect to the injury or death on account of which the report is made.

(d) The mailing of any report in a stamped envelope, properly addressed, within the time prescribed in subsection (a) or (b) of this section, shall be in compliance with this section.

(e)(1) Any employer who after notice refuses to send any report required of it by this section shall be subject to a civil penalty in an amount up to five hundred dollars (\$500) for each refusal.

(2) Whenever the employer has failed or refused to comply as provided in this section, the commission may serve upon the employer a proposed order declaring the employer to be in violation of this chapter and containing the amount, if any, of the civil penalty to be assessed against the employer pursuant to this section.

(f)(1) An employer may contest a proposed order of the commission issued pursuant to subsection (e) of this section by filing with the commission, within twenty (20) days of receipt of the proposed order, a written request for a hearing.

(2) If a written request for hearing is not filed with the commission within this time, the proposed order, proposed penalty, or both, shall be a final order of the commission.

(3) Such a request for a hearing need not be in any particular form but shall specify the grounds upon which the person contests the proposed order, the proposed assessment, or both.

(4) A proposed order by the commission pursuant to this section is prima facie correct, and the burden is upon the employer to prove that the proposed order is incorrect.

(g) Hearings conducted under this section shall proceed as provided in §§ 11-9-704 — 11-9-711.

(h) If an employer fails to pay any civil penalty assessed against the employer after an order issued pursuant to this section has become final by operation of law, the commission may petition the circuit court of the county wherein is located the employer's principal place of business for an order enjoining the employer from engaging in further employment or conduct of business or until such time as the employer makes all required reports and pays all civil penalties.

History. Init. Meas. 1948, No. 4, § 34, Acts 1949, p. 1420; A.S.A. 1947, § 81-1334; Acts 1993, No. 796, § 26.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided, in part: "Nothing in the act, which originated as House Bill 2646 of

2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

ANALYSIS

Constitutionality.
Attorney's Fee.
Duty to Report.
Failure to Report.
Report as Claim.

Constitutionality.

This section is facially neutral and in no way violates the equal protection clause of the Fourteenth Amendment to the United States Constitution; there is nothing in the language of this section to indicate that any individual or group of individuals is to be singled out for different treatment under similar circumstances. *International Paper Co. v. McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984).

Where employer was afforded a hearing before the Workers' Compensation Commission to determine whether a lump-sum attorney's fee would be awarded, that hearing provided the employer due process of law in regard to the award of a lump-sum attorney's fee. *International Paper Co. v. McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984).

Attorney's Fee.

Where, at the time petition seeking bi-weekly payments was filed, the claimant had a right to ask that his attorney be paid in one lump-sum, but he did not do so and the administrative law judge entered an award directing that the attorney's fees be paid on a biweekly basis as they accrued, the order of the administrative law judge became final after a period of 30 days not only as to the amount of compensation but also as to the manner in which it was to be paid, and a reopening of the matter was barred by the doctrine of res judicata. *Gwin v. R.D. Hall Tank Co.*, 10 Ark. App. 12, 660 S.W.2d 947 (1983).

This section authorizes the commission to award lump-sum attorney's fees; no limitations are set forth, because none

were apparently intended. The legislature must have intended to authorize the commission to award fees in any or all cases. Thus, the statute's guidelines are discernible; lump-sum attorney's fees can be awarded in any or all cases. *International Paper Co. v. McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984).

Duty to Report.

The first duty to report an injury to the Workers' Compensation Commission lies with the employer not the employee, and the employer is not entitled to extend its duty to pay compensation within 15 days by withholding the filing of the claim with the commission in the first instance. *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980).

Evidence sufficient to support commission's finding that the claim was controverted in its entirety since the employer must bear any loss resulting from its own reporting mistakes and delays. *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980).

Failure to Report.

An employer's failure to file a report to the Workers' Compensation Commission within 10 days of receipt of knowledge of the claimant's injury did not render erroneous as a matter of law the Commission's decision that the plaintiff's claim was time-barred. *Chambers v. International Paper Co.*, 56 Ark. App. 90, 938 S.W.2d 861 (1997).

Report as Claim.

Report and letters of employer to commission of death of employee did not constitute filing of a claim, since no request or demand was made for payment by dependents. *Little v. Smith*, 223 Ark. 601, 267 S.W.2d 511 (1954).

Cited: *Ethridge v. Alexander Brown & Associates*, 258 Ark. 444, 527 S.W.2d 591 (1975).

11-9-530. Managed care implementation.

Implementation of Workers' Compensation Commission Rule 33 regarding managed care shall be voluntary for all employers.

History. Acts 1997, No. 975, § 11; 1999, No. 1179, § 12.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-4, 6-10, and

§§ 11-9-501 to 11-9-529 may not apply to this section which was enacted subsequently.

SUBCHAPTER 6 — OCCUPATIONAL DISEASE

SECTION.

11-9-601. Compensation generally.

11-9-602. Compensation for silicosis or asbestosis.

SECTION.

11-9-603. Practice and procedure.

Effective Dates. Acts 1975 (Extended Sess., 1976), No. 1227, § 21: Feb. 13, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that the welfare of both employer and employee is of primary interest and concern to the State of Arkansas; that the maximum benefits presently payable under the Workmen's Compensation laws are inadequate due to the steadily increasing cost of living and should be increased immediately to meet said increase in the cost of living; that certain other provisions should be clarified or modified, and that it is in the best interest of both employers and employees that this be accomplished as soon as possible. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the preservation of the public peace, health, and safety, shall be in full

force and effect from and after its passage and approval."

Acts 1987, No. 1015, § 21: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1227 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Publisher's Notes. *Ricarte v. State*, CR 86-31, referred to in Acts 1987, No. 1015, § 21, is cited as 290 Ark. 100, 717 S.W.2d 488 (1986).

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Sexual assaults as compensable under workers' compensation, 52 A.L.R.4th 731.

Compensability of injuries incurred traveling to or from medical treatment of earlier compensable injury, 83 A.L.R.4th

110.

Compensability of injury during tryout, employment test, or similar activity designed to determine employability, 8 A.L.R.5th 798.

Coverage of employee's injuries or death from exposure to the elements - modern cases, 20 A.L.R.5th 346.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment, 47

A.L.R.5th 801.

Employee's injuries sustained in use of employer's restroom as covered by workers' compensation, 80 A.L.R.5th 417.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of sudden emotional stimuli involving personnel action, 82 A.L.R.5th 149.

Right to workers' compensation for emotional distress or like injury suffered by claimant as result of sudden emotional stimuli involving non-personnel action, 83 A.L.R.5th 103.

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Ark. L. Rev. Sufficiency of Proof in Traumatic Cancer: A Medico-Legal Quandary, 16 Ark. L. Rev. 243.

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U. Ark. Little Rock L.J. Powell, Survey of Worker's Compensation Law, 3 U. Ark. Little Rock L.J. 329.

11-9-601. Compensation generally.

(a) Where an employee suffers from an occupational disease as defined in this subchapter and is disabled or dies as a result of the disease and where the disease was due to the nature of the occupation or process in which he or she was employed within the period previous to his or her disablement as limited in subsection (g) of this section, then the employee, or, in case of death, his or her dependents, shall be entitled to compensation as if the disablement or death were caused by injury, except as otherwise provided in this subchapter.

(b) No compensation shall be payable for an occupational disease if the employee, at the time of entering into the employment of the employer by whom the compensation would otherwise be payable, falsely represented himself or herself in writing as not having previously been disabled, laid off, or compensated in damages or otherwise, because of the disease.

(c)(1) Where an occupational disease is aggravated by any other disease or infirmity, not itself compensable, or where disability or death from any other cause, not itself compensable, is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease, the compensation payable shall be reduced and limited to the proportion only of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as the occupational disease, as a causative factor, bears to all the causes of the disability or death.

(2) The reduction in compensation is to be effected by reducing the number of weekly or monthly payments or the amounts of the payments, as under the circumstances of the particular case may be for the best interest of the claimant.

(d) No compensation for death from an occupational disease shall be payable to any person whose relationship to the deceased which, under the provisions of this chapter, would give right to compensation arose

subsequent to the beginning of the first compensable disability except to afterborn children of a marriage existing at the beginning of the disability.

(e)(1)(A) "Occupational disease", as used in this chapter, unless the context otherwise requires, means any disease that results in disability or death and arises out of and in the course of the occupation or employment of the employee or naturally follows or unavoidably results from an injury as that term is defined in this chapter.

(B) However, a causal connection between the occupation or employment and the occupational disease must be established by a preponderance of the evidence.

(2) No compensation shall be payable for any contagious or infectious disease unless contracted in the course of employment in or immediate connection with a hospital or sanatorium in which persons suffering from that disease are cared for or treated.

(3) No compensation shall be payable for any ordinary disease of life to which the general public is exposed.

(f)(1) Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of the disease and the carrier, if any, on the risk when the employee was last injuriously exposed under the employer shall be liable.

(2) The amount of the compensation shall be based upon the average weekly wage of the employee when last injuriously exposed under the employer, and the notice of injury and claim for compensation, as required pursuant to this subchapter, shall be given and made to the employer.

(g)(1) An employer shall not be liable for any compensation for an occupational disease unless:

(A) The disease is due to the nature of an employment in which the hazards of the disease actually exist and are characteristic thereof and peculiar to the trade, occupation, process, or employment and is actually incurred in his or her employment. This includes any disease due to or attributable to exposure to or contact with any radioactive material by an employee in the course of his or her employment;

(B) Disablement or death results within three (3) years in case of silicosis or asbestosis, or one (1) year in case of any other occupational disease, except a diseased condition caused by exposure to X rays, radioactive substances, or ionizing radiation, after the last injurious exposure to the disease in the employment; or

(C) In case of death, death follows continuous disability from the disease, commencing within the period above limited, for which compensation has been paid or awarded or timely claim made as provided in this subchapter and results within seven (7) years after the last exposure.

(2) However, in case of a diseased condition caused by exposure to X rays, radioactive substances, or ionizing radiation only, the limitations expressed do not apply.

History. Init. Meas. 1948, No. 4, § 14, Acts 1949, p. 1420; Acts 1963, No. 539, §§ 1, 2; 1975 (Extended Sess., 1976), No. 1227, § 11; A.S.A. 1947, § 81-1314; reen. Acts 1987, No. 1015, § 11; Acts 2001, No. 1281, § 1.

A.C.R.C. Notes. This section was reen-

acted by Acts 1987, No. 1015, § 11. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

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sembly, Labor Law, 24 U. Ark. Little Rock L. Rev. 493.

CASE NOTES

ANALYSIS

- Constitutionality.
- In General.
- Construction.
- Apportionment.
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- Change of Carriers.
- Classification of Condition.
- Evidence.
- False Representation.
- Injury.
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Constitutionality.

Even though the Workers' Compensation Commission may not have authority to declare challenged statutes unconstitutional, such issues should first be raised at the administrative law judge or commission level. *Hamilton v. Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982).

Appellant's constitutional challenge to the silicosis limitations statute failed for lack of proof that an arbitrary classification was involved or the statute was unsupported by a legitimate governmental interest. *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988), rehearing denied, 25 Ark. App. 66, 754 S.W.2d 850 (1988), review denied, 297 Ark. 24, 759 S.W.2d 792 (Ark. 1988).

In General.

Occupational diseases are generally gradual rather than sudden in onset. *Hancock v. Modern Indus. Laundry*, 46 Ark. App. 186, 878 S.W.2d 416 (1994).

Construction.

A proper interpretation of subdivision (e)(2) requires that it be read in conjunction with this chapter as a whole, and particularly those sections dealing with the same subject matter. *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984); *Hyman v. Farmland Feed Mill*, 24 Ark. App. 63, 748 S.W.2d 151 (1988).

Apportionment.

Subdivision (c)(1) of this section contemplates two situations wherein apportionment is appropriate; the first situation arises when an occupational disease is aggravated by any other noncompensable disease or infirmity, and the second situation arises when a noncompensable disability or death is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease. *Jenkins v. Halstead Indus.*, 17 Ark. App. 197, 706 S.W.2d 191 (1986).

There is no requirement in subdivision (c)(1) of this section for the noncompensable disease or infirmity to be independently producing disability before and after the development of the occupational disease in order for it to be apportionable. *Jenkins v. Halstead Indus.*, 17 Ark. App. 197, 706 S.W.2d 191 (1986).

Where there was substantial evidence in the record to support the Workers' Compensation Commission's finding that the occupational disease was aggravated by another disease or infirmity, not itself compensable, and that apportionment was proper, the commission did not err in finding that 92% of the claimant's disability was attributable to smoking, and 8% of his disability was attributable to his occu-

pation. *Jenkins v. Halstead Indus.*, 17 Ark. App. 197, 706 S.W.2d 191 (1986).

Workers' compensation commission erred in holding two healthcare providers equally liable for benefits payable to a nurse who was disabled as a result of sensitivity to latex gloves worn while the nurse was employed by the providers; the appellate court remanded the matter to the commission to assign liability based on when the nurse was last injuriously exposed to latex considering the factor of when her disablement occurred and not merely when the symptoms of the problem manifested themselves. *Washington Reg'l Med. Ctr. Mgmt. Servs. v. Smith*, 75 Ark. App. 246, 58 S.W.3d 858 (2001).

Causal Connection.

Fact that breathing of dust, which aggravated disease, continued over a period of years and damage was gradual and it could not be shown at what exact instant disability occurred was not ground for denying compensation. *Batesville White Lime Co. v. Bell*, 212 Ark. 23, 205 S.W.2d 31 (1947) (decision under prior law).

The Workers' Compensation Commission is not required to rely upon inference that there is a causal connection between the injury and the disability where there is positive medical testimony to the contrary. The determination of whether the causal connection of the injury to the disability exists is a question of fact for the commission to determine. *Carter v. Flintrol, Inc.*, 19 Ark. App. 317, 720 S.W.2d 337 (1986), superseded by statute as stated in, *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998).

Causal connection is generally a matter of inference, and possibilities may play a proper and important role in establishing that relationship. *Hope Brick Works v. Welch*, 33 Ark. App. 103, 802 S.W.2d 476 (1991).

In workers' compensation cases, medical opinions need not be expressed in terms of reasonable medical certainty in speaking of a causal connection when there is supplemental evidence supporting the causal connection. *Hope Brick Works v. Welch*, 33 Ark. App. 103, 802 S.W.2d 476 (1991).

Commission's finding of a causal connection between the claimant's silicosis and his employment was supported by substantial evidence. *Hope Brick Works v.*

Welch, 33 Ark. App. 103, 802 S.W.2d 476 (1991).

There was no basis in the record for the Workers' Compensation Commission to find that the claimant failed to prove by clear and convincing evidence that her occupational disease was caused by her employment where her physician testified that the claimant was exposed to substances that were on a warning label and that it "was very likely that these substances caused the trouble," and he also responded affirmatively when asked whether he believed within a reasonable medical certainty that the claimant's exposure at work was at least 51 percent of the cause of her condition. *Howell v. Scroll Techs.*, 343 Ark. 297, 35 S.W.3d 800 (2001).

Change of Carriers.

Where claimant applied for workers' compensation claiming permanent partial disability caused by an occupational disease, and the employer changed insurance carriers during the period in which he worked, full liability fastened upon the insurer which was on a risk at the time the employee ceased work, absolving any prior insurers regardless of the extremity of progression of the disease, short of cessation of work. *Employers Liab. Assurance Corp. v. Employers Mut. Liab. Ins. Co.*, 232 Ark. 113, 334 S.W.2d 701 (1960).

Classification of Condition.

The commission's efforts to categorize a condition as an injury or occupational disease should be based not simply on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of workers' compensation law, which include the general remedial goals of the act, efficiency of future claim handling, the extent to which the classification being considered would encourage safer employment practices, and avoidance of unacceptably high costs to the system. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

In determining whether a condition is an injury or occupational disease, where the ambiguity of the statutory language permits alternative interpretations, the workers' compensation commission and courts should generally resolve the ambiguity in favor of claimants. *Tyson Foods,*

Inc. v. Watkins, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

In determining whether a condition is an injury or an occupational disease, the initial presumption should be that conditions on the pre-1976 schedule of compensable occupational diseases were still to be handled under former A.S.A. § 81-1314 (see now §§ 11-9-601 — 11-9-603), although the commission is not required to do so since the schedule has been repealed. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

Where the evidence showed that the appellant's traumatic injury resulted from a single injurious exposure and was sudden in its onset, the commission erred in characterizing it as an occupational disease rather than an injury. *Hancock v. Modern Indus. Laundry*, 46 Ark. App. 186, 878 S.W.2d 416 (1994).

Where an employee acquired a serious infection through scratches obtained during the course of employment, the Arkansas Workers' Compensation Commission erred by requiring the employee to prove that the infection was an occupational disease; the employee was only required to establish a causal link between the scratches and the infection in order to show a compensable accident injury under § 11-9-102(4)(a). *Heptinstall v. Asplundh Tree Expert Co.*, 84 Ark. App. 215, 137 S.W.3d 421 (2003).

Evidence.

Worker fell within the odd-lot category, and commission's finding of permanent and total disability was supported by substantial evidence. *Hyman v. Farmland Feed Mill*, 24 Ark. App. 63, 748 S.W.2d 151 (1988).

Where only one of four experts testified that the claimant's symptoms were caused by exposure to toxic chemicals, the evidence was sufficient to support the Commission's determination that the claimant was not entitled to benefits for an occupational disease. *Johnson v. Democrat Printing & Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138 (1997).

False Representation.

A false representation as to a physical condition in procuring employment will preclude the benefits of this chapter for an otherwise compensable injury if it is shown that the employee knowingly and

willfully made a false representation as to his physical condition, the employer relied upon the false representation, which reliance was a substantial factor in the employment, and there was a causal connection between the false representation and the injury. *Shippers Transp. v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979).

Injury.

Evidence must show that injury was cause of sickness which resulted in claimant's death before recovery can be had for wrongful death under this chapter. *Springdale Monument Co. v. Allen*, 216 Ark. 426, 226 S.W.2d 42 (1950) (decision under prior law).

Liability.

Employer's obligation was for the disability of the claimant which was caused by the occupational disease, not only the loss of the use of the lungs which was caused by claimant's occupational disease. *Quality Serv. Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991).

Occupational Diseases.

Evidence sufficient to establish that claimant suffered from compensable occupational disease. *Solid Steel Scissors Co. v. Kennedy*, 205 Ark. 958, 171 S.W.2d 929 (1943); *Scobey v. Southern Lumber Co.*, 218 Ark. 671, 238 S.W.2d 640 (1951) (preceding cases decided under prior law); *Travelers Ins. Co. v. Heidelberger*, 267 Ark. 971, 593 S.W.2d 70 (Ct. App. 1980); *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984).

Evidence insufficient to establish that claimant was suffering from occupational disease. *Triebisch v. Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951); *Taylor v. McAdams*, 270 Ark. 707, 606 S.W.2d 141 (1980).

Where the undisputed facts showed that ischial bursitis was caused by constant and repeated pressure on the parts affected, such condition was an occupational disease within the meaning of this section. *Brown Shoe Co. v. Fooks*, 228 Ark. 815, 310 S.W.2d 816 (1958).

Where it is shown that condition resulted from the position the employee had to maintain during the employment it could be an occupational disease and it is not necessary to show whether the same condition affected any coworkers. *Brown*

Shoe Co. v. Fooks, 228 Ark. 815, 310 S.W.2d 816 (1958).

An occupational hazard is quite different from occupational diseases defined in this section. *Neal v. Hanford Produce Co.*, 256 Ark. 1074, 511 S.W.2d 636 (1974).

Salmonella infection held to be occupational disease. *Dega Poultry Co. v. Tanner*, 259 Ark. 396, 533 S.W.2d 207 (1976).

In construing subdivision (e)(3), the fact that the general public may contract the disease is not controlling; the test of compensability is whether the nature of employment exposes the worker to a greater risk of that disease than the risk experienced by the general public or workers in other employments. *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984).

An occupation disease is characteristic of an occupation, process or employment where there is a recognizable link between the nature of the job performed and an increased risk in contracting the occupational disease in question. *Sanyo Mfg. Corp. v. Leisure*, 12 Ark. App. 274, 675 S.W.2d 841 (1984).

Claimant's histoplasmosis was the type of infection which is compensable under this section. *Osmose Wood Preserving v. Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992).

Because employee's development of sinus difficulties as a result of exposure to mold in the classroom was peculiar and characteristic of particular employment which exposed her to a greater risk of that disease, employee sustained an occupational disease arising out of and in the course of her employment. *Crossett Sch. Dist. v. Gourley*, 50 Ark. App. 1, 899 S.W.2d 482 (1995).

Although the decision of the Arkansas Workers' Compensation Commission contained a thorough discussion of the existence of objective findings to support the existence of a compensable injury and on the causal relationship between the injury and work, the Commission's findings were lacking with regard to the substantive claim because the Commission made no findings on the issue of how the claim fit within the occupational disease construct

under subdivision (g)(1)(A) of this section. *Pharmerica v. Seratt*, 103 Ark. App. 9, 285 S.W.3d 699 (2008).

Proof.

Employee had the burden of proving that disease was the result of treatment for an occupational back injury which was compensable. *Tigue v. Caddo Minerals Co.*, 253 Ark. 1140, 491 S.W.2d 574 (1973).

In a claim for occupational disease, a claimant cannot prevail on a mere preponderance of the evidence. The causal connection between the occupation or employment and the occupational disease must be established by clear and convincing evidence. *Arkansas Dep't of Cor. v. Chance*, 271 Ark. 472, 609 S.W.2d 666 (1980).

The characterization of claimant's injury affects the burden of proof. If claimant's condition is an "injury," she has the burden of proving that it arose out of and in the course of her employment by a preponderance of the evidence; but if her condition is an "occupational disease," a causal connection between the employment and the disease must be established by clear and convincing evidence. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

Employee failed to prove by a preponderance of the evidence that the plantar fasciitis (heel spurs) was caused or aggravated by her employment. *Jackson v. Poulan/Weed Eater*, 46 Ark. App. 18, 876 S.W.2d 276 (1994).

Statute of Limitations.

The statute of limitations was tolled by the payment of compensation in the form of medical benefits not included in the disability payments credited by the insurance carriers to its group coverage. *Mohawk Tire & Rubber Co. v. Bridger*, 257 Ark. 587, 518 S.W.2d 499 (1975).

Cited: *Tri State Ins. Co. v. Employers Mut. Liab. Ins. Co.*, 254 Ark. 944, 497 S.W.2d 39 (1973); *Mohawk Tire & Rubber Co. v. Bridger*, 257 Ark. 587, 518 S.W.2d 499 (1975); *Hamilton v. Jeffrey Stone Co.*, 293 Ark. 499, 739 S.W.2d 161 (1987); *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988).

11-9-602. Compensation for silicosis or asbestosis.

(a) As used in this subchapter, unless the context otherwise requires:

(1) "Asbestosis" means the characteristic fibrotic condition of the lungs caused by the inhalation of asbestos dust; and

(2) "Silicosis" means the characteristic fibrotic condition of the lungs caused by the inhalation of silica dust.

(b) In the absence of conclusive evidence in favor of the claim, disability or death from silicosis or asbestosis shall be presumed not to be due to the nature of any occupation within the provision of this subchapter unless during the ten (10) years immediately preceding the date of disablement the employee has been exposed to the inhalation of silica dust or asbestos dust over a period of not less than five (5) years, two (2) years of which shall have been in this state, under a contract of employment existing in this state. However, if the employee has been employed by the same employer during the whole of the five-year period, his or her right to compensation against the employer shall not be affected by the fact that he or she had been employed during any part of the period outside of this state.

(c) Except as in this subchapter otherwise provided, compensation for disability from uncomplicated silicosis or asbestosis shall be payable in accordance with the provisions of §§ 11-9-519 — 11-9-526. However, no compensation shall be payable for disability from silicosis or asbestosis of less than thirty-three and one-third percent ($33\frac{1}{3}\%$) of the total disability.

(d)(1) In case of disability or death from silicosis or asbestosis complicated with tuberculosis of the lungs, compensation shall be payable as for uncomplicated silicosis or asbestosis, provided that the silicosis or asbestosis was an essential factor in the causing of disability or death.

(2) In case of disability or death from silicosis or asbestosis complicated with any other disease, or from any other disease complicated with silicosis or asbestosis, the compensation shall be reduced as provided in § 11-9-601(c).

(e)(1)(A)(i) Where an employee, though not actually disabled, is found by the Workers' Compensation Commission to be affected by silicosis or asbestosis to such a degree as to make it unduly hazardous for him or her to continue in an employment involving exposure to the hazards of the disease, the commission may order that he or she be removed from his or her employment. In such a case, or in case he or she has already been discharged from the employment and is unemployed, he or she shall be entitled to compensation until he or she can obtain steady employment in some other suitable occupation in which there are no hazards of the disease.

(ii) However, the compensation shall in no case be payable for longer than twenty-six (26) weeks immediately following the date of removal or discharge and unless application for compensation is made within the period.

(B) In case the employee obtains other suitable employment at reduced wages, the payments of compensation during such part of the twenty-six-week-period as he or she is so employed shall be at the rate prescribed in § 11-9-520.

(2)(A) When in any case the forced change of employment shall, in the opinion of the commission, require that the employee be given special training in order to fit him or her for another occupation, the employer liable for compensation shall pay for the training and incidental traveling expenses an additional sum, in no case, however, to exceed four hundred dollars (\$400).

(B) The payment shall be made for the benefit of the employee to such person as the commission shall direct.

(C) No payment, however, shall be made unless the employee accepts the special training directed by the commission, nor shall payment be made for a longer period than the employee submits to the training.

(3) If an employee has been compensated, whether specially trained or not, and thereafter engages in any occupation which exposes him or her to hazards of silicosis or asbestosis without first having obtained the written approval of the commission, neither he or she, his or her dependents, personal representative, nor any other person shall be entitled to compensation or damages for his or her disablement or death from either of the diseases.

(4) However, neither a claim for nor receipt of compensation or benefits under this subsection shall bar the employee from any right to compensation for actual disability from silicosis or asbestosis if the disability results not later and within the time limited in § 11-9-601(g).

History. Init. Meas. 1948, No. 4, § 14, Acts 1949, p. 1420; Acts 1975 (Extended Sess., 1976), No. 1227, § 11; A.S.A. 1947, § 81-1314; reen. Acts 1987, No. 1015, § 11.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 1015, § 11. Acts

1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

CASE NOTES

ANALYSIS

Evidence.

Period of Employment.

Statute of Limitations.

Wage-Loss Benefits.

Evidence.

Evidence not sufficient to justify award for silicosis. *Collier-Dunlap Coal Co. v. Dickerson*, 218 Ark. 885, 239 S.W.2d 9 (1951).

Evidence sufficient to justify award for silicosis. *Hixson Coal Co. v. Furstenberg*,

225 Ark. 568, 284 S.W.2d 120 (1955); *Hope Brick Works v. Welch*, 33 Ark. App. 103, 802 S.W.2d 476 (1991).

Evidence sufficient to support the commission's findings that a claimant's mesothelioma was caused by his exposure to asbestos during the years he was employed; thus, the claimant was entitled to recovery for an occupational disease. *Alcoa v. Vann*, 14 Ark. App. 223, 686 S.W.2d 812 (1985).

Objective medical evidence, including pulmonary function test results and a doctor's opinion, showed that an employee

seeking workers' compensation had a 50% impairment due to silicosis; the pulmonary-function test was an objective test despite the fact that employee was at least partially able to control his breathing and may not have made a full effort during each breathing test. *DeQueen Sand & Gravel Co. v. Cox*, 95 Ark. App. 234, 236 S.W.3d 5 (2006).

Period of Employment.

Under a liberal construction of the statute short sick periods would not be deducted from period of employment so as to defeat presumption of disability from silicosis after five-year period of employment. *Jeffery Stone Co. v. Raulston*, 242 Ark. 13, 412 S.W.2d 275 (1967).

Statute of Limitations.

In silicosis cases the statute of limitations commences to run at the time of disablement and not from the time the claimant learns he is suffering from the disease, and the disablement doesn't occur until the employee is unable to work and earn his usual wages. *Jeffery Stone Co. v. Raulston*, 242 Ark. 13, 412 S.W.2d 275 (1967); *Hamilton v. Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982).

Wage-Loss Benefits.

Fifty percent wage-loss assignment for an employee who was diagnosed with silicosis was supported by substantial evidence including (1) a doctor's opinion that the employee could not continue to work in an environment where excessive dust was present, (2) the fact that the employee did not have a high school diploma, and (3) the fact that the employee was motivated to work and had been a hard worker for many years. *DeQueen Sand & Gravel Co. v. Cox*, 95 Ark. App. 234, 236 S.W.3d 5 (2006).

Cited: *Tri State Ins. Co. v. Employers Mut. Liab. Ins. Co.*, 254 Ark. 944, 497 S.W.2d 39 (1973); *Mohawk Tire & Rubber Co. v. Brider*, 257 Ark. 587, 518 S.W.2d 499 (1975); *Hamilton v. Jeffrey Stone Co.*, 293 Ark. 499, 739 S.W.2d 161 (1987); *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988); *Rogers v. Armstrong World Indus., Inc.*, 744 F. Supp. 901 (E.D. Ark. 1990); *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990); *Johnson v. Democrat Printing & Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138 (1997).

11-9-603. Practice and procedure.

(a)(1) Except as otherwise provided in this subchapter, procedure with respect to notice of disability or death and as to the filing of claims and determination of claims shall be the same as in cases of accidental injury or death.

(2)(A) Written notice shall be given to the employer of an occupational disease by the employee, or someone in his or her behalf, within ninety (90) days after the first distinct manifestation thereof.

(B) In the case of death from an occupational disease, written notice of death shall also be given to the employer within ninety (90) days thereafter.

(b) An award or denial of award of compensation for an occupational disease may be reviewed and compensation increased, reduced, or terminated where previously awarded, or awarded where previously denied, only upon proof of fraud or undue influence or of change of condition, and then only upon application by a party in interest made not later than one (1) year after the denial of award or, where compensation has been awarded, after the award or the date when the last payment was made under the award, except in cases of silicosis or asbestosis, where the time limit shall be two (2) years.

History. Init. Meas. 1948, No. 4, § 14, Acts 1949, p. 1420; Acts 1975 (Extended Sess., 1976), No. 1227, § 11; A.S.A. 1947, § 81-1314; reen. Acts 1987, No. 1015, § 11.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 1015, § 11. Acts

1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

CASE NOTES

ANALYSIS

Appeal.

Burden of Proof.

Notice.

Appeal.

Even though circuit court on appeal from commission in occupational disease case may have authority to review the case on all questions whether of law or fact, there must be substantial evidence to support the finding of the circuit court. *Bruner-Ivory Handle Co. v. Yates*, 212 Ark. 1010, 208 S.W.2d 997 (1948) (decision under prior law).

Burden of Proof.

An employee's claim for benefits for illness resulting from exposure to certain chemicals, was for an occupational disease and thus subject to the clear and convincing evidence standard. *Johnson v. Democrat Printing & Lithograph*, 57 Ark. App. 274, 944 S.W.2d 138 (1997).

Notice.

Even though claimant did not give proper notice of claim to employer, the requirement was waived where employer did not raise any objection at or before the first hearing. *Peerless Coal Co. v. Gordon*, 237 Ark. 152, 372 S.W.2d 240 (1963).

Waiver of notice applicable to occupational diseases is no different from that applicable to accidental injuries; notice

can be waived in either case. *Peerless Coal Co. v. Gordon*, 237 Ark. 152, 372 S.W.2d 240 (1963).

The authority of the Workers' Compensation Commission to excuse the failure to give notice under § 11-9-701 would also apply to the failure to give notice of occupational disease as required under this section. *Quality Serv. Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991).

The time period for notice to the employer begins to run from the first distinct manifestation of a disease cognizable under workers' compensation, not the first distinct manifestation of the disease. *Quality Serv. Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991).

Court was unable to make a determination with regard to an employer's claims of improper notice of an occupational disease because the Arkansas Workers' Compensation Commission made no findings with regard to whether or not an employee complied with the notice requirements of subdivision (a)(2)(A) of this section. *Pharmerica v. Seratt*, 103 Ark. App. 9, 285 S.W.3d 699 (2008).

Cited: *Tri State Ins. Co. v. Employers Mut. Liab. Ins. Co.*, 254 Ark. 944, 497 S.W.2d 39 (1973); *Mohawk Tire & Rubber Co. v. Bridger*, 257 Ark. 587, 518 S.W.2d 499 (1975); *Hamilton v. Jeffrey Stone Co.*, 293 Ark. 499, 739 S.W.2d 161 (1987); *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988).

SUBCHAPTER 7 — PROCEEDINGS BEFORE WORKERS' COMPENSATION COMMISSION

SECTION.

11-9-701. Notice of injury or death.

11-9-702. Filing of claims.

11-9-703. Preliminary conference procedure.

11-9-704. Proceedings on claims.

11-9-705. Nature of proceedings generally.

SECTION.

11-9-706. Conduct of proceedings — Contempt.

11-9-707. Presumptions.

11-9-708. Depositions.

11-9-709. Witness fees.

11-9-710. Attorneys.

SECTION.

- 11-9-711. Finality of order or award — Review.
- 11-9-712. Enforcement of order or award.
- 11-9-713. Modification of awards.
- 11-9-714. Costs in proceedings brought without reasonable grounds.

SECTION.

- 11-9-715. Fees for legal services.
- 11-9-716. Lump-sum attorney's fees.
- 11-9-717. Attorney's signature.

A.C.R.C. Notes. References to "this subchapter" in §§ 11-9-701 — 11-9-715 may not apply to §§ 11-9-716 and 11-9-717, which were enacted subsequently.

Effective Dates. Acts 1975 (Extended Sess., 1976), No. 1227, § 21: Feb. 13, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that the welfare of both employer and employee is of primary interest and concern to the State of Arkansas; that the maximum benefits presently payable under the Workmen's Compensation law are inadequate due to the steadily increasing cost of living and should be increased immediately to meet said increase in the cost of living; that certain other provisions should be clarified or modified, and that it is in the best interest of both employers and employees that this be accomplished as soon as possible. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 215, § 3: Mar. 1, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Arkansas Supreme Court has invalidated the award of lump sum attorneys fees by the Workers Compensation Commission in instances where the claimant was awarded compensation payable in installments. This has resulted in attorneys fees being paid in minute amounts over a long period of time, and if the claimant dies prior to the attorneys fees being fully recovered from the installment payments, the attorney does not receive full compensation for his efforts. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from the date of its passage and approval."

Acts 1979, No. 252, § 5: July 1, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the expeditious disposition of claims under the Workers' Compensation Law and of judicial review of adjudications made by agencies subject to the Administrative Procedure Act are of great interest and concern to the State of Arkansas and the parties involved in such proceedings; and that the present system of judicial review has not been adequate to insure the prompt and final determination of the issues involved in such matters and, as a result, there has been undue delay to the prejudice of the State and the parties involved. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after July 1, 1979."

Acts 1979, No. 253, § 12: Mar. 2, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain provisions of the Worker's Compensation law are in urgent need of revision to more clearly define the benefits to be provided by Worker's Compensation coverage; that this Act is designed to provide such clarification and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1979, No. 822, § 3: Apr. 10, 1979. Emergency clause provided: "It is hereby found and determined by the Seventy-Second General Assembly that since the Arkansas Court of Appeals does not go into effect until July 1, 1979, it is necessary to delineate in this Act the allowance for legal fees in cases appealed from the Workers Compensation Commission in in-

stances of appeal to the Supreme Court until the Court of Appeals goes into effect and thereafter in instances involving appeals to the Court of Appeals. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 290, § 17: Mar. 3, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that there is urgent need to clarify the provisions of the Arkansas Workers' Compensation law and to provide improved benefits for persons qualifying under that Act; that this Act is designed to provide such clarification and improved benefits and should be given effect at the earliest possible date. Therefore an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 631, § 5: Mar. 23, 1981. Emergency clause provided: "It is hereby found and determined by the Seventy-Third General Assembly that the law as to permissible cross appeals to the Workers' Compensation Commission and the Arkansas Court of Appeals is ambiguous and must be clarified immediately to eliminate the possibility of inequitable treatment of parties before these tribunals; that Section 20 of the Workers' Compensation Act should be immediately amended to eliminate internal inconsistency in the Act; and that the scope of the Commission's authority to award attorneys fees on a lump sum basis is unclear and must be immediately clarified. Therefore, an emergency is hereby declared to exist, and this Act, being immediately necessary for the preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1986 (2nd Ex. Sess.), No. 10, § 15: July 1, 1986. Emergency clause provided: "It is hereby found and determined by the General Assembly that the increased benefits and improvements in the administration of the Workers' Compensation system in Arkansas is in the best interest of employees, employers, and the public in general; therefore, an emergency is hereby declared to exist and this Act,

being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1986."

Acts 1987, No. 1015, § 21: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1227 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 796, § 41: July 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Workers' Compensation Law is in immediate need of substantial revision; that this act accomplishes immediate revision; and that this act shall go into effect as soon as is practical which is determined to be July 1, 1993; and that unless this emergency clause is adopted, this act will not go into effect until after July 1, 1993. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1993. Furthermore, the provisions of this act shall apply only to injuries which occur after July 1, 1993."

Acts 2003, No. 227, § 16: July 1, 2003. Emergency clause provided: "It is found and determined by the General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 2003 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 2003 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health

and safety shall be in full force and effect from and after July 1, 2003."

Acts 2003, No. 1473, § 74: July 1, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act includes technical corrects to Act 923 of 2003 which establishes the classification and compensation levels of state employees covered by the provisions of the Uni-

form Classification and Compensation Act; that Act 923 of 2003 will become effective on July 1, 2003; and that to avoid confusion this act must also effective on July 1, 2003. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2003."

RESEARCH REFERENCES

ALR. When statute of limitation begins to run as to cause of action for development of latent industrial or occupational disease, 1 A.L.R.4th 395.

Recovery of benefits previously paid to claimant or beneficiary: right of insurer to intervene in workers' compensation proceeding, 38 A.L.R.4th 355.

Reopening lump-sum compensation payment, 26 A.L.R.5th 127.

Availability, rate, or method of calculation of interest on attorneys' fees of penalties, 79 A.L.R.5th 201.

Am. Jur. 82 Am. Jur. 2d, Work. Comp., § 488 et seq.

Ark. L. Rev. Administrative Law in Arkansas, 4 Ark. L. Rev. 107.

Copeland, The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?, 47 Ark. L. Rev. 1.

C.J.S. 100 C.J.S., Work. Comp., § 788 et seq.

U. Ark. Little Rock L.J. Powell, Survey of Worker's Compensation Law, 3 U. Ark. Little Rock L.J. 329.

11-9-701. Notice of injury or death.

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

(2) All reporting procedures specified by the employer must be reasonable and shall afford each employee reasonable notice of the reporting requirements.

(3) The foregoing shall not apply when an employee requires emergency medical treatment outside the employer's normal business hours; however, in that event, the employee shall cause a report of the injury to be made to the employer on the employer's next regular business day.

(b)(1) Failure to give the notice shall not bar any claim:

(A) If the employer had knowledge of the injury or death;

(B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; or

(C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

(2) Objection to failure to give notice must be made at or before the first hearing on the claim.

History. Init. Meas. 1948, No. 4, § 17, Acts 1949, p. 1420; Acts 1975 (Extended Sess., 1976), No. 1227, § 14; 1979, No. 253, § 5; 1986 (2nd Ex. Sess.), No. 10, § 7; A.S.A. 1947, § 81-1317; reen. Acts 1987, No. 1015, § 14.

A.C.R.C. Notes. This section was reen-

acted by Acts 1987, No. 1015, § 14. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Karber, Survey of Arkansas Law: Workers' Compensation, 2 U. Ark. Little Rock L.J. 294.

CASE NOTES

ANALYSIS

Construction.
Applicability.
Effect of Failure.
Evidence.
Exceptions.
Injury.
Objection for Failure to Notify.
Sufficiency.
Timeliness.
Waiver.

Construction.

In view of the beneficent purposes of the workers' compensation program, this section must be construed liberally in favor of the claimant and all doubtful cases resolved in claimant's favor. *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976).

Where claim predated the 1993 amendment of § 11-9-704(c)(3), the court properly declined to apply the new strict standard of construction to its interpretation of the notice provisions of this section. *Weyerhaeuser Co. v. Johnson*, 48 Ark. App. 100, 891 S.W.2d 64 (1995).

Applicability.

In plaintiff's asbestosis claim, this statutory exception to the three-year statute of limitations of § 11-9-702 was inapplicable because the plaintiff's case did not turn on his failure to notify his employer of the injury but instead on his failure to timely file a claim. *Chambers v. International Paper Co.*, 56 Ark. App. 90, 938 S.W.2d 861 (1997).

Effect of Failure.

Where no prejudice was shown, claimant's failure to give timely notice of his injury was not prejudicial. *Gunn Distrib. Co. v. Talbert*, 230 Ark. 442, 323 S.W.2d 434 (1959).

Where a worker injured his back but the symptoms did not manifest themselves for over a year, his failure to give notice of his injury at the time it took place was not a bar to recovery. *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985).

Evidence.

Where there was some confusion as to when city employing police officer received a report of the officer's injury as required by subdivision (a)(1) of this section, testimony of chief of police as to when he was informed of the officer's injury provided substantial evidence to support the Workers' Compensation Commission's decision as to when the officer's entitlement to compensation commenced. *City of Fort Smith v. Brooks*, 40 Ark. App. 120, 842 S.W.2d 463 (1992).

Exceptions.

Claimant's failure to give the required statutory notice did not come within any of the three statutory exceptions. *Wallis v. Whirlpool Corp.*, 12 Ark. App. 101, 671 S.W.2d 760 (1984).

The authority of the Workers' Compensation Commission to excuse the failure to give notice under this section would also apply to the failure to give notice of occupational disease as required under § 11-

9-603. *Quality Serv. Railcar v. Williams*, 36 Ark. App. 29, 820 S.W.2d 278 (1991).

Subdivision (b)(1) provides excuses for a claimant's failure to give written notice to an employer according to the requirements set forth in subdivision (a)(1). *Weyerhaeuser Co. v. Johnson*, 48 Ark. App. 100, 891 S.W.2d 64 (1995).

Injury.

The term injury means compensable injury. An injury does not become compensable until the claimant first learns the extent of his injuries and is off work for a period that would entitle him to benefits for a compensable injury. *Calion Lumber Co. v. Goff*, 14 Ark. App. 18, 684 S.W.2d 272 (1985).

Objection for Failure to Notify.

An objection that claimant failed to give timely notice of his injury could not be availed of under this section where the objection was not made at or before the first hearing, which in this case was not done. *Gunn Distrib. Co. v. Talbert*, 230 Ark. 442, 323 S.W.2d 434 (1959).

Where employer did not object to lack of formal notice at first hearing, the objection could not be raised on appeal. *Potlatch Forests, Inc. v. Funk*, 239 Ark. 330, 389 S.W.2d 237 (1965).

Employer did not assert his defenses of failure of employee to give notice and the running of the statute of limitations at the initial hearing, and they could not be raised for the first time on appeal. *International Paper Co. v. Langley*, 251 Ark. 859, 475 S.W.2d 686 (1972).

Sufficiency.

Where an employee reports his injury as he knows it without designating its nature because not aware thereof, compensation cannot be refused for lack of notice. *Harris Motor Co. v. Pitts*, 212 Ark. 145, 205 S.W.2d 21 (1947) (decision under prior law).

The Workers' Compensation Commission used the wrong legal standard when deciding that the physician's testimony must be given in terms of reasonable medical certainty before it could be said the claimant had met his burden of proof on the causation issue. *Pittman v. Wygal Trucking Plant*, 16 Ark. App. 232, 700 S.W.2d 59 (1985), superseded by statute as stated in, *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998).

Workers' compensation benefits were properly awarded to an employee, a teacher, after the employee fell and sustained a knee injury where the employee had informed a supervisor of the injury on the date of occurrence, thus satisfying the notice requirement. *Swift Pub. Schs. Risk Mgmt. Res. v. Shields*, 101 Ark. App. 208, 272 S.W.3d 851 (2008).

Timeliness.

Evidence sufficient to find that notice was timely. *Triebisch v. Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951); *Potlatch Forests, Inc. v. Funk*, 239 Ark. 330, 389 S.W.2d 237 (1965) (decisions prior to 1986 amendment).

Denial of an employee's claim for workers' compensation benefits was remanded because the Arkansas Workers' Compensation Commission arbitrarily attributed the injury to a non-work related cause despite competent medical evidence to the contrary. A delay in notifying the employer of the injury did not bar the claim under subdivision (b)(1)(B) of this section. *Stevens v. Mid-South Mixers, Inc.*, 2010 Ark. App. 519, — S.W.3d — (2010).

Waiver.

The requirement of giving notice to employer of claims can be waived either in a case of occupational disease or accidental injury. *Peerless Coal Co. v. Gordon*, 237 Ark. 152, 372 S.W.2d 240 (1963).

Cited: *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988).

11-9-702. Filing of claims.

(a) TIME FOR FILING.

(1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. If during the two-year period following the filing of the claim the claimant

receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter. For purposes of this section, the date of the compensable injury shall be defined as the date an injury is caused by an accident as set forth in § 11-9-102(4).

(2)(A) A claim for compensation for disability on account of injury which is either an occupational disease or occupational infection shall be barred unless filed with the commission within two (2) years from the date of the last injurious exposure to the hazards of the disease or infection.

(B) However, a claim for compensation for disability on account of silicosis or asbestosis must be filed with the commission within one (1) year after the time of disablement, and the disablement must occur within three (3) years from the date of the last injurious exposure to the hazard of silicosis or asbestosis.

(C) Also, a claim for compensation for disability on account of a disease condition caused by exposure to X rays, radioactive substances, or ionizing radiation only must be filed with the commission within two (2) years from the date the condition is made known to an employee following examination and diagnosis by a medical doctor.

(3) A claim for compensation on account of death shall be barred unless filed with the commission within two (2) years of the date of such a death.

(4) If within six (6) months after the filing of a claim for compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, be dismissed without prejudice to the refiling of the claim within limitation periods specified in subdivisions (a)(1)-(3) of this section.

(b) TIME FOR FILING ADDITIONAL COMPENSATION.

(1) In cases in which any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation or two (2) years from the date of the injury, whichever is greater.

(2) The time limitations of this subsection shall not apply to claims for the replacement of medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus permanently or indefinitely required as the result of a compensable injury, when the employer or carrier previously furnished such medical supplies, but replacement of such items shall not constitute payment of compensation so as to toll the running of the statute of limitations.

(c) A claim for additional compensation must specifically state that it is a claim for additional compensation. Documents which do not specifically request additional benefits shall not be considered a claim for additional compensation.

(d) If within six (6) months after the filing of a claim for additional compensation no bona fide request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if

necessary, be dismissed without prejudice to the refileing of the claim within the limitation period specified in subsection (b) of this section.

(e) **FAILURE TO FILE.** Failure to file a claim within the period prescribed in subsection (a) or (b) of this section shall not be a bar to the right unless objection to the failure is made at the first hearing on the claim in which all parties in interest have been given a reasonable notice and opportunity to be heard.

(f) **PERSONS UNDER DISABILITY.**

(1) Notwithstanding any statute of limitation provided for in this chapter, when it is established that failure to file a claim by an injured employee or his or her dependents was induced by fraud, the claim may be filed within one (1) year from the time of the discovery of the fraud.

(2) Subsection (a) or (b) of this section shall not apply to a mental incompetent or minor so long as the person has no guardian or similar legal representative. The limitations prescribed in subsection (a) or (b) of this section shall apply to the mental incompetent or minor from the date of the appointment of a guardian or similar legal representative for that person, and when no guardian or similar representative has been appointed, to a minor upon obtainment of majority.

(g)(1) A latent injury or condition shall not delay or toll the limitation periods specified in this section.

(2) However, this subsection shall not apply to the limitation period for occupational diseases specified in subdivision (a)(2) of this section.

(h)(1) The purpose of this section is to provide for a timely hearing on claims for benefits.

(2) The purpose and intent of this section also includes the annulment of any case law inconsistent with this section.

History. Init. Meas. 1948, No. 4, § 18, Acts 1949, p. 1420; Acts 1963, No. 539, § 3; Init. Meas. 1968, No. 1, § 5, Acts 1969; Acts 1979, No. 108, § 1; 1981, No. 290, § 6; 1986 (2nd Ex. Sess.), No. 10, § 8; A.S.A. 1947, § 81-1318; Acts 1993, No. 796, § 27.

A.C.R.C. Notes. Acts 2001, No. 1757,

§ 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

ALR. When time period commences as to claim under workers' compensation or occupational diseases act for death of worker due to contraction of disease. 100 A.L.R.5th 567.

Ark. L. Rev. Workmen's Compensation — Statute of Limitations on Seeking Additional Benefits, 24 Ark. L. Rev. 148.

Leflar, Compensation for Work-Related Illness in Arkansas, 41 Ark. L. Rev. 89.

U. Ark. Little Rock L.J. Notes, Work-

ers' Compensation — Statute of Limitations on Seeking Additional Benefits. *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979), 3 U. Ark. Little Rock L.J. 513.

Arkansas Law Survey, Greene, Workers' Compensation, 7 U. Ark. Little Rock L.J. 271.

Survey—Workers' Compensation, 11 U. Ark. Little Rock L.J. 269.

CASE NOTES

ANALYSIS

Constitutionality.

Purpose.

Applicability.

Action at Law.

Dismissal.

Employer's Duty.

Foreign Award.

Jurisdiction.

Notice of Treatment.

Payment of Compensation.

Statute of Limitations.

—Additional Compensation.

—Disease.

—Estoppel.

—Latent Injuries.

—Timeliness.

—Tolling the Statute.

—Waiver.

Sufficiency.

Time of Injury.

Constitutionality.

Even though the Workers' Compensation Commission may not have authority to declare challenged statutes unconstitutional, such issues should first be raised at the administrative law judge or commission level. *Hamilton v. Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982).

Appellant's constitutional challenge to the silicosis limitations statute failed for lack of proof that an arbitrary classification was involved or the statute was unsupported by a legitimate governmental interest. *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988), rehearing denied, 25 Ark. App. 66, 754 S.W.2d 850 (1988), review denied, 297 Ark. 24, 759 S.W.2d 792 (Ark. 1988).

Purpose.

The primary purpose of the one-year statute of limitations in subsection (b) of this section is to give the claimant that much extra time to decide whether he has been fully compensated for his injury; consistent with this purpose is the rule that the period is tolled so long as the claimant is being furnished medical services or is being "compensated" — it is the furnishing of the services that tolls the statute, not the payment thereof. *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994).

Applicability.

The statute of limitations does not apply to scheduled injuries. *Minnesota Mining & Mfg. v. Baker*, 63 Ark. App. 160, 975 S.W.2d 863 (1998), rev'd, 337 Ark. 94, 989 S.W.2d 151 (1999).

While a two-year statute of limitations applied to the filing of a claim for workers' compensation benefits pursuant to subsection (a)(1), that limitations period did not apply to bar the employee's claim against the employer where the employee was not filing a claim for workers' compensation benefits, but instead was seeking to enforce an Illinois judgment he had already received based on an injury he sustained in Illinois while working for the employer; in that case, the 10-year limitations period for enforcement of judgments applied, pursuant to Ark. Code Ann. § 16-56-114, and the employee's claim was not barred under it. *Dodson v. Taylor*, 346 Ark. 443, 57 S.W.3d 710 (2001).

Employee's request to obtain a factual determination from the Arkansas Workers' Compensation Commission was not barred by the two-year statute of limitations in this section as the limitation period did not apply where employee was not making a claim for benefits. *Johnson v. Bonds Fertilizer, Inc.*, 365 Ark. 133, 226 S.W.3d 753 (2006).

This section applies solely to claims for additional compensation; thus, it did not apply to a factual determination of whether claimant was a special employee because no claim for compensation had been filed against the company, only a third-party claim filed under § 11-9-402. *Nucor Corp. v. Rhine*, 366 Ark. 550, 237 S.W.3d 52 (2006).

Action at Law.

If in suit for damages it is found that a worker is an employee, not an independent contractor, then, upon further determination by the Workers' Compensation Commission, the employer or insurance carrier is entitled to claim the statutory allowance provided for in subsection (e). *Co-Ark. Const. Co. v. Amsler*, 234 Ark. 200, 352 S.W.2d 74 (1961).

The doctrine of election of remedies is not applicable where a workers' compensation claim is made subsequent to the filing of an action at law by an employee

against an employer. *Owens v. Bill & Tony's Liquor Store*, 258 Ark. 887, 529 S.W.2d 354 (1975).

Filing a claim before the administrative agency of another state charged with the administration of its worker's compensation laws is not an action at law. *Haney v. Young Sales Corp.*, 22 Ark. App. 212, 737 S.W.2d 669 (1987).

Dismissal.

Subdivision (a)(4) of this section grants the Commission authority to dismiss a claim without prejudice; under the authority granted by § 11-9-205(a)(1)(A), the Commission has promulgated a rule which provides that if a party requests that a claim be dismissed for want of prosecution, the Commission may dismiss the claim with prejudice. *Johnson v. Triple T Foods*, 55 Ark. App. 83, 929 S.W.2d 730 (1996).

Employer's Duty.

Medical treatments which are required so as to stabilize or maintain an injured worker are the responsibility of the employer under subsection (b) of this section. *Artex Hydrophonics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Foreign Award.

A claimant, on the one hand, should be bound by his acceptance of an official award of compensation in one state if he had actively participated in the procurement of the award and if the employer or insurance carrier had not improperly or in bad faith channeled the claim into that state; if the claimant, on the other hand, did not know that the payments he was receiving were pursuant to the laws of another state, and the payments were not made under an official award, an employer's or carrier's contention that the payment was "under the laws of another state" was a self-serving claim which should not be given effect. *Houston Contracting Co. v. Young*, 267 Ark. 322, 590 S.W.2d 653 (1979).

Jurisdiction.

Where employee asserted a cause of action in circuit court based in part on this chapter and in part on the Arkansas Civil Rights Act, § 16-123-101 et seq., the circuit court did not lack subject-matter jurisdiction. *Malone v. Trans-States Lines*, 325 Ark. 383, 926 S.W.2d 659 (1996).

Notice of Treatment.

Employer's failure to receive actual notice of follow-up treatment is not determinative of the limitations on claim for additional compensation where "payment of compensation" was made by employer by virtue of the medical services which were actually furnished within the limitations period and for which employer had reason to know would be furnished. *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994).

There is no better way for petitioner to decide whether he has been fully compensated than to return to his authorized physician or staff for follow-up treatments after surgery; moreover, there is no better illustration of medical services with respect to the provision of which an employer or carrier should have knowledge than follow-up treatment from an authorized surgery. The better practice would be for the employer to be actually notified of these follow-up visits, although the better practice is not what is required by this section. *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994).

Payment of Compensation.

The furnishing of medical services constitutes payment of compensation in the context of subsection (b) of this section, and such "payment" suspends the running of the time for filing a claim for compensation. *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253 (1994).

Statute of Limitations.

If injury becomes known to claimant his lack of knowledge as to the law on filing of claims is no defense, since one in full possession of his mental faculties should know that he should file a claim if he has an injury. *Sanderson & Porter v. Crow*, 214 Ark. 416, 216 S.W.2d 796 (1949) (decision under prior law).

Where, on appeal to Supreme Court in workers' compensation case, appellant did not make any argument in its brief of the defense of the statute of limitations it had urged below, the point would be treated as abandoned. *W. Shanhouse & Sons v. Sims*, 224 Ark. 86, 272 S.W.2d 68 (1954).

If a substantial doubt exists as to the applicable statute of limitations, the longer rather than the shorter limitation is to be preferred and adopted. *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290

S.W.2d 211 (1956); *Guthrie v. Tyson Foods, Inc.*, 20 Ark. App. 69, 724 S.W.2d 187 (1987).

Where an employer or his insurance carrier furnishes an injured employee medical and hospital services, this constitutes a payment of compensation or waiver which suspends the running of the time for filing a claim for compensation. *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956).

The time of disablement is the time when the employee actually became unable to perform his regular work. *Quality Excelsior Coal Co. v. Smith*, 233 Ark. 67, 342 S.W.2d 480 (1961); *Arkansas Coal Co. v. Steele*, 237 Ark. 727, 375 S.W.2d 673 (1964).

Where employee voluntarily refunded amounts compensation carrier had tendered as compensation and medical payments, the refunded amounts belonged to the employee and not to the carrier, and employee was entitled to them even though period of limitations for compensation claims had expired. *Bryan v. Ford*, *Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969).

The limitations under this section run in favor of the employer, and a worker's compensation carrier cannot claim the benefit thereof unless the limitation has also run in favor of the employer. *Browning's Restaurant v. Kuykendall*, 263 Ark. 374, 565 S.W.2d 33 (1978).

The burden is not on the carrier to find out whether medical treatments are continuing; the burden is, rather, on the claimant to act within the time allowed. *Superior Fed. Sav. & Loan Ass'n v. Shelby*, 265 Ark. 599, 580 S.W.2d 201 (1979).

While claims for replacement medicine may toll the running of the statute of limitations, such claims cannot revive once the statute has run against other forms of compensation. *Terminal Van & Storage v. Hackler*, 270 Ark. 113, 603 S.W.2d 893 (1980).

The statute of limitations does not run against replacement medicine and claimant could still receive replacement for medicine and drugs if she could establish a connection to the original injury; nevertheless, payment for replacement medicine does not revive a claim for additional benefits once the statute has run against other types of compensation. *Terminal*

Van & Storage v. Hackler, 270 Ark. 113, 603 S.W.2d 893 (1980).

The purpose of the statute of limitations in workers' compensation cases is to permit prompt investigation and treatment of injuries. *Woodard v. ITT Highbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (1980); *St. John v. Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983).

The statute of limitations provided in subsection (a) does not begin to run until the true extent of the injury manifests itself and causes an incapacity to earn the wages which the employee was receiving at the time of the accident, which wage loss continues long enough to entitle him to benefits under subchapter 5 of this chapter. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983); *Hall's Cleaners v. Wortham*, 38 Ark. App. 86, 829 S.W.2d 424, *aff'd*, 311 Ark. 103, 842 S.W.2d 7 (1992).

Where claimant was incapacitated to earn the wages he was receiving at the time of his accident and the incapacitation continued for a long enough period to entitle him to benefits under § 11-9-501, he sustained a compensable injury within the meaning of this section and the statute of limitations began running at that time, notwithstanding that the claimant was paid full wages during period of incapacitation. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

The statute of limitations does not begin to run until the employee knows or should reasonably be expected to be aware of the extent or nature of the injury. *Freeman v. Tiffany Stand & Furn.*, 20 Ark. App. 183, 726 S.W.2d 294 (1987), appeal dismissed, *American Mut. Ins. Co. v. Argonaut Ins. Co.*, 801 S.W.2d 55 (1991).

The burden of filing a claim within the statute of limitations is on the claimant. *Plunkett v. St. Francis Valley Lumber Co.*, 25 Ark. App. 195, 755 S.W.2d 240 (1988).

The court cannot extend the period of the statute of limitations on appeal, despite the fact that the claim may be meritorious. *Plunkett v. St. Francis Valley Lumber Co.*, 25 Ark. App. 195, 755 S.W.2d 240 (1988).

When the substantial character of the injury becomes known, then the claimant must file his claim within a specified period of time, or be barred thereafter by the statute of limitations. *McDonald Equip.*

Co. v. Turner, 26 Ark. App. 264, 766 S.W.2d 936 (1989).

For purposes of commencing the statute of limitations under subdivision (a)(1), the word "injury" is to be construed as "compensable injury," and an injury does not become "compensable" until (1) the injury develops or becomes apparent and (2) claimant suffers a loss in earnings on account of the injury; thus, the statute of limitations does not begin to run until both elements of the rule are met. *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992).

This state is technically a "compensable injury" state. *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992).

Although claimant's injury to her thumb had been apparent for some three years, it was not until she underwent surgery that the limitations period under subdivision (a)(1) commenced to run. *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992).

Because it was clear that the employer's reduction in workers' compensation payments to the employee was without benefit of an order to do so, and the employee was simply attempting to enforce the prior order in the employee's favor and not set forth a claim for additional benefits, this section did not bar the claim. *Carroll Elec. Coop. v. Pack*, 85 Ark. App. 293, 151 S.W.3d 324 (2004).

Because claimant's employer had previously paid claimant's medical expenses, his claim should have been one for "additional" benefits, however, regardless of whether the request was classified as an "initial" claim or an "additional" claim, claimant was entitled to benefits; if the claim was classified as a claim for "additional" benefits, then the claim, timely filed, tolled the statute of limitations, and if the claim was classified as a claim for "initial" benefits, it could not be dismissed without a hearing. *Dillard v. Benton County Sheriff's Office*, 87 Ark. App. 379, 192 S.W.3d 287 (2004).

Workers' compensation commission erred in finding that a claim was not barred by subsection (b) of this section and awarding benefits because it found that the claimant had obtained treatment for his shoulder on March 13, 2002 which was within one year of the December 2001 order of dismissal. Instead, the commission should have made a finding as to the

last date of payment of compensation because the claim had to have been filed within one year of that date. *Single Source Transp. v. Kent*, 99 Ark. App. 153, 258 S.W.3d 416 (2007).

Where an employee sustained a compensable heart injury by inhaling toxic smoke and subsequently alleged that the inhalation of chemicals also caused permanent damage to the employee's lungs, the claim for a separate lung injury was barred by the statute of limitations because the employee did not effectively file a claim for a lung injury at the same time the employee filed the initial timely claim for a heart injury, and the "latent injury" rule did not save the claim. *Martin Charcoal, Inc. v. Britt*, 102 Ark. App. 252, 284 S.W.3d 91 (2008).

Claimant was entitled to receive additional workers' compensation benefits because he filed a claim for additional benefits within one year of his last date of compensation, pursuant to subsection (b) of this section, and because reasonable persons could find that the claimant's continued treatment was necessitated by his work-related injuries. *Kent v. Single Source Transp., Inc.*, 103 Ark. App. 151, 287 S.W.3d 619 (2008), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 460 (Apr. 16, 2009).

Under subdivision (f)(2) of this section, the legislature intended to protect minors, residing with a natural parent who failed to pursue a claim on their behalf, by permitting them to file a claim after age eighteen; under subdivision (f)(2) and § 11-9-801, the legislature contemplated court action for the appointment of a guardian and the Arkansas Workers' Compensation Commission properly allowed the decedent's son's claim for dependent-death benefits pursuant to subdivision (f)(2). *Hicks v. Bates*, 104 Ark. App. 348, 292 S.W.3d 850 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 717 (Mar. 18, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 487 (June 4, 2009).

Arkansas Workers' Compensation Commission properly held that an employee's 2005 claim for medical benefits for a 2000 injury was not time-barred by subsection (b) of this section because the claim was not for additional benefits, but was for the enforcement of a prior order; the employer had stopped paying for medical treat-

ment, without an order to do so, that the employee received after May 2002. *Care Manor v. Wheeler*, 2009 Ark. App. 132, 307 S.W.3d 32 (2009).

Arkansas Workers' Compensation Commission erred in finding that the claim for additional benefits was barred by the statute of limitations, because the conclusion that the entry of the agreed order resolved the request for additional benefits and effectively adjudicated the claim for additional benefits ignored the statutory language allowing for an injured employee to pursue additional benefits when the need indisputably arose within the statutory framework; the case was never dismissed pursuant to subsection (d) of this section, and the agreed order granted a continuing award of benefits which included the physician referral. *Curtis v. Big Lots*, 2009 Ark. App. 292, 307 S.W.3d 37 (2009).

Workers' Compensation Commission erroneously concluded that the claim for additional benefits was time barred, because the claimant's timely request for additional medical benefits tolled the statute of limitations until the claim was finally and completely litigated, not only on the general medical-benefit claim but on all benefits that might flow from that specific request. *Stewart v. Ark. Glass Container*, 2009 Ark. App. 300, 307 S.W.3d 614 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 680 (May 27, 2009), rev'd, *Stewart v. Ark. Glass Container & Risk Mgmt. Res.*, 2010 Ark. 198, — S.W.3d — (2010).

When appellant developed problems with her fingers in 1993 and 1994 while working on the assembly of motors, she received medical treatment during those years. Although she complained about her thumb in 2005, this was not a new injury; her claim for additional benefits filed in 2007 was barred by the statute of limitations set forth in subdivision (a)(1) and subsection (b) of this section. *DeSpain v. Franklin Elec. Co.*, 2009 Ark. App. 770, — S.W.3d — (2009).

Pursuant to this section, the Arkansas Workers' Compensation Commission did not err in finding that the employee's claim was time barred as his present claim was characterized as one for additional benefits; the services were not considered at the time of the previous opinion. *Gardner v. Beverly Enters.*, 2009 Ark. App. 787, — S.W.3d — (2009).

Claimant's request for additional medical benefits was time-barred under this section because it was not filed one year from when the claimant last received medical benefits or two years from date of the claimant's injury; the claimant's request for change of physician and an administrative law judge's order on a prior claim that was dismissed in its entirety did not toll the statute. *Stewart v. Ark. Glass Container & Risk Mgmt. Res.*, 2010 Ark. 198, — S.W.3d — (2010).

Permanent disability claims were barred by the statute of limitations in subdivision (b)(1) of this section because, although a claimant filed a timely request for additional medical treatment, she failed to request permanent-disability benefits until more than one year after the last payment of compensation by an employer. *Flores v. Walmart Distribution*, 2012 Ark. App. 201, — S.W.3d — (2012).

—Additional Compensation.

The cost of medicine and medical, surgical, or hospital services provided under this chapter is compensation within the meaning of subsection (b), allowing additional claim to be filed for injuries within one year from the last payment of compensation. *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956).

Provision of subsection (b) makes no distinction between voluntary payment of compensation and payments made as the result of an award or order of the commission after a hearing and applies to both cases. *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956).

Where there was doubt as to whether employee's claim for additional compensation after receipt of compensation was governed by the six-month period provided by § 11-9-713 for modification of an award or by subsection (b) of this section, the longer period provided by this section was favored. *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956).

Primary purpose of the one-year statute is to give the claimant that much extra time to decide whether he has been fully compensated for his injury, not for the purpose of paying belated medical bills. *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Perkins v. Arkansas State Hwy. Dep't*, 5 Ark. App. 203, 634 S.W.2d 399 (1982).

Subsection (b) is applicable only when a claimant had received compensation and then sought additional compensation. *Miller v. Southern Mach. & Iron Works*, 239 Ark. 218, 388 S.W.2d 391 (1965).

Subsection (b) cannot be used to extend the period within which death benefit can be claimed beyond one year from date of death. *Miller v. Southern Mach. & Iron Works*, 239 Ark. 218, 388 S.W.2d 391 (1965).

While the furnishing of additional medical services is compensation and constitutes payment so as to suspend the running of the statutory limitation, the limitation runs from the date of the furnishing of the medical services and not the date of payment therefor by the employer or insurance carrier. *Heflin v. Pepsi Cola Bottling Co.*, 244 Ark. 195, 424 S.W.2d 365 (1968).

Medical treatment furnished the employee constitutes the payment of compensation, and the statutory period of limitation for filing a claim with the commission for additional compensation starts running from the date of last treatment. *McFall v. United States Tobacco Co.*, 246 Ark. 43, 436 S.W.2d 838 (1969).

In a claim for additional compensation the statute of limitations only commences at the date the last payment would have been due if the compensation had been paid in installments instead of a lump-sum settlement. *Southern Cotton Oil Co. v. Friar*, 247 Ark. 98, 444 S.W.2d 556 (1969).

A claim for additional compensation is to be treated as a continuation of the original demand for compensation, and in fixing the attorney's fee thereon the action of the commission in the parent case is to be considered, while the maximum fee shall be within the fixed limitations of § 11-9-715 and shall not exceed certain percentages of compensation awarded. *Norsworthy v. Georgia-Pacific Corp.*, 249 Ark. 159, 458 S.W.2d 401 (1970).

An employer's offer to provide medical services from one source or another for an employee who has returned to work following a period of temporary disability did not amount to the payment of compensation within the meaning of subsection (b). *Industrial, Inc. v. Pierce*, 263 Ark. 11, 563 S.W.2d 1 (1978).

The manifest purpose of the 1968 amendment to subsection (b) of this sec-

tion was to extend the statute with respect to an employee's right to obtain the replacement of medicine, crutches, artificial limbs, and other apparatus that would be permanently or indefinitely required as a result of the original compensable injury. *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979).

The one-year statute governing claims for additional compensation runs from the last payment of compensation, which means the furnishing of medical services. *Superior Fed. Sav. & Loan Ass'n v. Shelby*, 265 Ark. 599, 580 S.W.2d 201 (1979).

Evidence sufficient to support the commission's finding that the medical treatment afforded claimant effectively tolled the running of the statute of limitation, and therefore the employer was liable for the additional medical expenses incurred by the claimant. *Salant & Salant, Inc. v. Williams*, 267 Ark. 987, 593 S.W.2d 63 (Ct. App. 1980).

There is only one consistent, harmonious construction to be placed on the relationship between subsection (b) of this section and § 11-9-713 in an effort to make them both effective: Where a claimant seeks additional benefits after a final award, § 11-9-713 governs as to the grounds required, and subsection (b) of this section governs the period of limitation for all claims for additional benefits whether or not there has been a final award. *Southern Wooden Box Co. v. Smith*, 5 Ark. App. 14, 631 S.W.2d 620 (1982).

A claimant is not entitled under Arkansas law to obtain additional benefits after a final award without a showing that he has experienced a change in physical condition; a change in economic conditions is not a sufficient ground for reopening an award. *Southern Wooden Box Co. v. Smith*, 5 Ark. App. 14, 631 S.W.2d 620 (1982).

The burden of filing a claim for additional benefits within the statute of limitations is upon the claimant. *St. John v. Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983).

Where claim was not an original claim for compensation and the employer was fully aware of the injury and its compensability, counsel's letter notifying the Workers' Compensation Commission that he had been employed to assist the claimant

in connection with unpaid benefits, and listing the claimant's name, the employer's name, and the WCC file number was sufficient to constitute a claim for additional benefits. *Cook v. Southwestern Bell Tel. Co.*, 21 Ark. App. 29, 727 S.W.2d 862 (1987).

Period of limitations prescribed in subsection (b) is tolled where a person hired in Arkansas receives benefits under the law of another state where he is injured, but does not actively initiate the proceedings and remains unaware of the source of the payments. *Haney v. Young Sales Corp.*, 22 Ark. App. 212, 737 S.W.2d 669 (1987).

"Replacement medicine" is "medicine", and therefore, payment for replacement medicine is "payment of compensation" within meaning of subsection (b) of this section. Furnishing of replacement medicine may toll running of statute, but if more than one year passes between furnishing of replacement medicine to claimant, a claim for additional compensation may well be barred by statute because such claims are not revived once statute has run. *Evans v. Northwest Tire Serv.*, 23 Ark. App. 11, 740 S.W.2d 151 (1987), *aff'd*, *Northwest Tire Serv. v. Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988).

When the primary injury is shown to have arisen out of, and in the course of, the employment, the employer is responsible for every natural consequence that flows from that injury. If, after the period of initial disability has subsided, the injury flares up without an intervening cause and creates a second disability, it is a mere recurrence, and the employer remains liable if the claim is made within the greater of two years after the injury or one year after the date on which compensation was last paid. However, if the second period of disability is the result of a second incident which contributes independently to the injury, it is a new one for which the employer becomes liable, and the statute of limitations begins to run anew, even though the prior condition may contribute to a major part of the final condition. *McDonald Equip. Co. v. Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989).

In determining the date of the last payment of compensation under subsection (b), the date of receipt of the last payment rather than the due date is controlling.

Myles v. Paragould Sch. Dist., 28 Ark. App. 81, 770 S.W.2d 675 (1989).

Subsection (b) governs only the time in which a claimant, suffering a recurrence of an earlier fully compensated "compensable injury," must file a claim for "additional compensation." *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992).

Where claim, filed after insurer discontinued payment of disability benefits in 1988, was one for enforcement of the commission's 1986 order, rather than a request for "additional" compensation, the claim was not barred by subsection (b) of this section. *Helena Contracting Co. v. Williams*, 45 Ark. App. 137, 872 S.W.2d 423 (1994).

Claimant's treatment by physician was not based on a valid referral and the claim for additional compensation was barred by the statute of limitations when it was filed more than one year after date of last compensation payment and more than two years after the injury. *Pennington v. Gene Cosby Floor & Carpet*, 51 Ark. App. 128, 911 S.W.2d 600 (1995).

A 1995 claim for medical benefits was a claim for "additional compensation" and was not merely a request to enforce a 1981 opinion, since all of the benefits and compensation awarded in the 1981 opinion were paid prior to the issuance of that opinion and the claimant neither sought nor required any further medical treatment between 1981 and 1995. *Joe Brennan Gen. Contracting v. Adair*, 62 Ark. App. 240, 971 S.W.2d 798 (1998).

Employee's claim for additional compensation benefits following a knee replacement in 2003 for an injury that occurred in 1971 was not barred by the statute of limitations or by the doctrine of laches as the rehabilitation of employee's knee could not have been litigated earlier, and the limitations statute did not apply to replacement of the knee joint. *Jones Truck Lines v. Pendergrass*, 90 Ark. App. 402, 206 S.W.3d 272 (2005).

Arkansas Workers' Compensation correctly determined that claimant's request for additional benefits was barred by the statute of limitations because he did not request his shoulder surgery until more than one year after the last payment of benefits. *Eskola v. Little Rock Sch. Dist.*, 93 Ark. App. 250, 218 S.W.3d 372 (2005).

—Disease.

Where there was evidence to show that claimant had quit his work more than a year before bringing action because of silicosis the court would not reverse a finding of the commission that the claim was not filed within the statutory period. *Rannals v. Smokeless Coal Co.*, 229 Ark. 919, 319 S.W.2d 218 (1959).

In silicosis cases the statute of limitations commences to run at the time of disablement and not at the time the claimant learns he is suffering from the disease, and that disablement does not occur until the employee is unable to work and earn his usual wages. *Hamilton v. Jeffrey Stone Co.*, 6 Ark. App. 333, 641 S.W.2d 723 (1982).

—Estoppel.

Where claimant testified that he never saw the statutorily required form posted anywhere on the employer's premises, it was incumbent on the employer to offer evidence to show that the required notice had been posted as required by Arkansas law, and in the absence of such evidence employer was estopped from asserting the statute of limitations. *Rider v. Julian Martin, Inc.*, 31 Ark. App. 144, 789 S.W.2d 743 (1990).

—Latent Injuries.

If injury is latent, the statute of limitations for filing of claim does not begin to run until the date the injury becomes known. *Sanderson & Porter v. Crow*, 214 Ark. 416, 216 S.W.2d 796 (1949) (decision under prior law).

Filing of claim for latent injury barred. *Sanderson & Porter v. Crow*, 214 Ark. 416, 216 S.W.2d 796 (1949) (decision under prior law); *St. John v. Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983).

Injury to claimant's eye was patent, not latent, and therefore, his claim for additional compensation for the complete loss of the eye was barred by the two-year statutory period of limitation from the date of the injury. *Cornish Welding Shop v. Galbraith*, 278 Ark. 185, 644 S.W.2d 926 (1983).

Under the latent injury theory, the statute of limitations will begin to run when the substantial character of the injury becomes known. *St. John v. Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983).

The fact that the initial injury was a compensable one within the meaning of the act does not necessarily mean that the statute of limitations bars the claim at the end of two years from that date; where the full extent and nature of the injury are not known, nor reasonably ought to be known, until a later date, the running of the statute of limitations may be postponed under the latent injury rule. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

If the employer can show to the satisfaction of the commission that the claimant knew the substantial nature of the injury or that he should reasonably be expected to have been aware of the extent and nature of his injury for more than two years his claim would be barred. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

Commission's finding that injury was a latent one held not supported by substantial evidence. *McDonald Equip. Co. v. Turner*, 26 Ark. App. 264, 766 S.W.2d 936 (1989).

A work-related noise-induced hearing-loss injury does not become compensable until (1) the injury develops or becomes apparent and (2) the claimant suffers a loss in earnings on account of the injury, which loss is conclusively presumed; because the statute of limitation does not begin to run until both elements of the rule are met, and because of the conclusive presumption as to loss of earnings, which satisfies the second element, the statute of limitation with respect to work-related noise-induced hearing loss begins to run when the hearing loss becomes apparent to the claimant. *3M v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

The statute of limitations began to run with regard to the claimant's hearing loss when he was notified by his employer that a hearing test showed a decrease in his hearing ability, notwithstanding that he suffered no actual loss of earnings at that time. *ALCOA v. Carlisle*, 67 Ark. App. 61, 992 S.W.2d 172 (1999).

In the context of latent injuries, the appellate court found no language in Acts 1993, No. 796 that expressed a clear intention that it was to be applied retroactively, nor did the appellate court find that retroactive application of the Act was necessarily implied; thus, where employee had last received temporary total disabil-

ity benefits for her wrist injury in 1994, and in 2000 she suffered additional complications when a pin was removed from her wrist (the pin was placed in her wrist shortly after the injury in 1992), she was entitled to have her claim for additional benefits considered under the law in effect at the time of her injury. *Taylor v. Producers Rice Mill, Inc.*, 89 Ark. App. 327, 202 S.W.3d 565 (2005).

—Timeliness.

Filing held not timely. *Kimpel v. Garland Anthony Lumber Co.*, 216 Ark. 788, 227 S.W.2d 932 (1950) (decision under prior law); *Wilson v. Border Queen Kitchen Cabinet Co.*, 221 Ark. 580, 254 S.W.2d 682 (Ark. 1953); *Shaw v. Keeshin Poultry Co.*, 227 Ark. 90, 296 S.W.2d 400 (1956); *Key v. Arkansas Power & Light Co.*, 228 Ark. 585, 309 S.W.2d 190 (1958); *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961); *Shelby Electric Co. v. Duran*, 243 Ark. 344, 419 S.W.2d 798 (Ark. 1967); *Hudgens v. Southern Extrusions, Inc.*, 244 Ark. 470, 425 S.W.2d 718 (1968); *Hopper v. Rust Eng'g Co.*, 251 Ark. 698, 474 S.W.2d 414 (1971); *Petit Jean Air Serv. v. Wilson*, 251 Ark. 871, 475 S.W.2d 531 (1972); *Industrial, Inc. v. Pierce*, 263 Ark. 11, 563 S.W.2d 1 (1978); *Terminal Van & Storage v. Hackler*, 270 Ark. 113, 603 S.W.2d 893 (1980); *Seawright v. Seawright Super Saver*, 1 Ark. App. 26, 613 S.W.2d 102 (1981); *Perkins v. Arkansas State Hwy. Dep't*, 5 Ark. App. 203, 634 S.W.2d 399 (1982); *St. John v. Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983); *Haney v. Young Sales Corp.*, 22 Ark. App. 212, 737 S.W.2d 669 (1987); *Garrett v. Sears, Roebuck & Co.*, 43 Ark. App. 37, 858 S.W.2d 146 (1993); *Chambers v. International Paper Co.*, 56 Ark. App. 90, 938 S.W.2d 861 (1997).

Filing held timely. *Long-Bell Lumber Co. v. Mitchell*, 206 Ark. 854, 177 S.W.2d 920 (1944); *Donaldson v. Calvert McBride Printing Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950); *T.J. Moss Tie & Timber Co. v. Martin*, 220 Ark. 265, 247 S.W.2d 198 (1952) (preceding cases decided under prior law); *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956); *Parrish Esso Serv. Ctr. v. Adams*, 237 Ark. 560, 374 S.W.2d 468 (1964); *Jones Furn. Mfg. Co. v. Evans*, 244 Ark. 242, 424 S.W.2d 880 (1968); *Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d

562 (1969); *Dresser Minerals v. Hunt*, 262 Ark. 280, 556 S.W.2d 138 (1977); *Browning's Restaurant v. Kuykendall*, 263 Ark. 374, 565 S.W.2d 33 (1978); *Desoto, Inc. v. Parsons*, 267 Ark. 665, 590 S.W.2d 51 (Ct. App. 1979); *Ashcraft v. Hunter*, 268 Ark. 946, 597 S.W.2d 124 (Ct. App. 1980); *Woodard v. ITT Higbie Mfg. Co.*, 271 Ark. 498, 609 S.W.2d 115 (1980); *Shepherd v. Easterling Constr. Co.*, 7 Ark. App. 192, 646 S.W.2d 37 (1983); *Guthrie v. Tyson Foods, Inc.*, 20 Ark. App. 69, 724 S.W.2d 187 (1987); *Freeman v. Tiffany Stand & Furn.*, 20 Ark. App. 183, 726 S.W.2d 294 (1987), appeal dismissed, *American Mut. Ins. Co. v. Argonaut Ins. Co.*, 801 S.W.2d 55 (1991); *Cook v. Southwestern Bell Tel. Co.*, 21 Ark. App. 29, 727 S.W.2d 862 (1987).

The plaintiff's claim was barred by the statute of limitations where he was injured in 1993, he sought benefits for treatment he received in 1999, and the record contained substantial evidence that he suffered no incapacity to earn wages during the intervening six years. *Haygood Ltd. Pshp. v. Whisenant*, 74 Ark. App. 185, 47 S.W.3d 277 (2001).

Employee's workers' compensation claim was within the two-year period set forth in § 11-9-702 because the employee's hearing loss stabilized in 2001 when he retired and was no longer exposed to occupational noise; thus, his claim in July 2002 was within the required time-frame. The statute of limitations did not begin to run until a scheduled injury was permanent and a rating could be attributed to the injury. *Powers v. City of Fayetteville*, 97 Ark. App. 251, 248 S.W.3d 516 (2007).

Claim for permanent-partial-disability benefits in 2000 was not time barred because it was filed in 1994; a hearing in 1995 did not lift the toll on the limitations period under § 11-9-702(b) because the parties agreed not to litigate the issue in 1995 where the employee was still in the healing period for a shoulder injury. *Vanwagner v. Wal-Mart Stores*, 368 Ark. 606, 249 S.W.3d 123 (2007).

—Tolling the Statute.

Action in another state's court under its workers' compensation statute to recover money for injuries sustained by claimant tolled the statute until the termination of the action. *Aetna Cas. & Sur. Co. v. Jordan*, 234 Ark. 339, 352 S.W.2d 75 (1961).

Subsection (e) as a prerequisite to the tolling of the statute of limitations requires (1) an action at law to recover damages, (2) a denial of recovery, and (3) that the denial be on the ground that the employee and his employer were subject to this chapter. *Bryan v. Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969); *Guthrie v. Tyson Foods, Inc.*, 20 Ark. App. 69, 724 S.W.2d 187 (1987); *Haney v. Young Sales Corp.*, 22 Ark. App. 212, 737 S.W.2d 669 (1987); *Plunkett v. St. Francis Valley Lumber Co.*, 25 Ark. App. 195, 755 S.W.2d 240 (1988).

Evidence insufficient to find that statute of limitations was tolled. *Bryan v. Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969); *Haney v. Young Sales Corp.*, 22 Ark. App. 212, 737 S.W.2d 669 (1987).

Payment of wages to a disabled employee does not toll the statute unless the employer is aware or should be aware that it constitutes payment of compensation for the injury, and where the employee actually earns his wages by performing his regular duties after the injury, the presumption is that the wages are being paid for value received, and not in lieu of compensation. *McFall v. United States Tobacco Co.*, 246 Ark. 43, 436 S.W.2d 838 (1969).

The running of the statute of limitations on claims for medical and hospital expenses is not tolled by a wrongful refusal by the insurance carrier to make further payments and, although the Workers' Compensation Commission has the authority to order payment of the claims regardless of this section, where it has not done so the court cannot extend the period of the statute on appeal, despite the meritoriousness of the claim. *Miller v. Everett*, 252 Ark. 824, 481 S.W.2d 335 (1972).

Evidence sufficient to find that statute of limitations was tolled. *Mohawk Tire & Rubber Co. v. Brider*, 257 Ark. 587, 518 S.W.2d 499 (1975); *Mohawk Tire & Rubber Co. v. Brider*, 259 Ark. 728, 536 S.W.2d 126 (1976); *Salant & Salant, Inc. v. Williams*, 267 Ark. 987, 593 S.W.2d 63 (Ct. App. 1980); *Franklin County Rd. Dep't v. Nordin*, 270 Ark. 177, 603 S.W.2d 477 (1980); *Safeway Stores, Inc. v. Lamberson*, 5 Ark. App. 191, 634 S.W.2d 396 (1982); *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984), cert.

denied, 284 Ark. 439, 683 S.W.2d 222 (Ark. 1985); *Arkansas Power & Light Co. v. Giles*, 20 Ark. App. 154, 725 S.W.2d 583 (1987).

It is obvious that when this section is tolled by the actual furnishing of services, the statute is not tolled again when the services are paid for, since one transaction cannot interrupt the statute twice. *Mohawk Rubber Co. v. Thompson*, 265 Ark. 16, 576 S.W.2d 216 (1979).

A claimant may not toll the statute under subsection (b) merely by refilling a prescription, since § 11-9-508 specifically says that the medication must be reasonably necessary for the injury suffered and what is considered reasonably necessary will depend on the facts and circumstances of each case. *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980).

Payments for medicine are a part of compensation within the meaning of subsection (b) of this section for the purpose of tolling the statute of limitations of this chapter. *Alred v. Jackson Atl., Inc.*, 268 Ark. 695, 595 S.W.2d 249 (1980).

The employee's claim for additional medical benefits was not barred because the statute of limitations was tolled by the filing of a claim for additional workers' compensation benefits within the statutory period. *Sisney v. Leisure Lodges, Inc.*, 17 Ark. App. 96, 704 S.W.2d 173 (1986); *Arkansas Power & Light Co. v. Giles*, 20 Ark. App. 154, 725 S.W.2d 583 (1987); *Cook v. Southwestern Bell Tel. Co.*, 21 Ark. App. 29, 727 S.W.2d 862 (1987).

An action at law for damages need not be filed within the period prescribed by subdivision (a)(1) in order to give effect to the tolling provision in subsection (e). *Guthrie v. Tyson Foods, Inc.*, 20 Ark. App. 69, 724 S.W.2d 187 (1987).

Subsection (e) does not apply to the filing of a claim before the administrative agency in another state which administers its workers' compensation laws. Subsection (e) was not intended to apply to claims for statutory benefits for industrial injuries filed before the workers' compensation agencies of sister states but was designed to allow an extension of the period of limitations for the filing of claims by those who mistakenly pursued tort claims against their employers, when in fact the exclusive remedies afforded for their injuries were under the Workers' Compensation Act. *Haney v. Young Sales*

Corp., 22 Ark. App. 212, 737 S.W.2d 669 (1987).

The furnishing, by an employer, of replacement medicine to an injured employee is payment of "compensation" and thus tolls the statute of limitations applicable to a workers' compensation claim. *Northwest Tire Serv. v. Evans*, 295 Ark. 246, 748 S.W.2d 134 (1988).

Where a claim for additional compensation was filed on January 14, 1992, and the injury occurred on October 26, 1987, obviously more than two years prior to the filing, the claim was not barred by the statute of limitations, because the employee's visit to his physician in September, 1991, tolled the statute for one year under subsection (b) of this section; the date of the last payment of compensation has been equated with the date of the furnishing of medical services. *Conway Printing Co. v. Higdon*, 45 Ark. App. 185, 873 S.W.2d 172 (1994).

The statute of limitations does not begin to run until the claimant sustains an actual loss of earnings. *Minnesota Mining & Mfg. v. Baker*, 63 Ark. App. 160, 975 S.W.2d 863 (1998), rev'd, 337 Ark. 94, 989 S.W.2d 151 (1999).

A request for a change of physician can constitute a claim for additional compensation and toll the statute of limitations. *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 909 (2001).

Medical treatments received by the claimant in 1997 and 1998 following a 1992 injury did not toll the statute of limitations because there was substantial evidence to support the finding that the treatments at issue were related primarily to asthma and bronchitis and were not reasonably necessary in connection with her 1992 injuries. *Spencer v. Stone Container Corp.*, 72 Ark. App. 450, 38 S.W.3d 909 (2001).

Employee's claim for additional benefits was barred as an initial claim for benefits was decided by a prior 2000 decision that was not appealed; the prior claim did not toll the statute of limitations in this section when employee made an additional claim for benefits in 2004. *Barnes v. Fort Smith Pub. Schs.*, 95 Ark. App. 248, 235 S.W.3d 905 (2006).

Prehearing order, which stated that a workers' compensation claimant was seeking, among other things, additional temporary total disability benefits and

wage-loss benefits in excess of his already established permanent impairment rating, tolled the running of the statute of limitations under subdivisions (b)(1) and (c) of this section. *Bryant Sch. Dist. v. Aylor*, 2011 Ark. App. 173, — S.W.3d — (2011).

—Waiver.

Employer did not assert his defenses of failure of employee to give notice and running of the statute of limitations at the initial hearing, and they could not be raised for the first time on appeal. *International Paper Co. v. Langley*, 251 Ark. 859, 475 S.W.2d 686 (1972).

Sufficiency.

Report of employer to commission that employee had been killed and advising commission that deceased had been supporting his father followed by letters between commission and insurer relative to investigation did not constitute filing of a claim, since no request or demand was made for payment by dependents. *Little v. Smith*, 223 Ark. 601, 267 S.W.2d 511 (1954).

Time of Injury.

This section limits the two-year period from the date of the accident, and not from the date the injury was discovered. *Furr v. Harding Glass Co.*, 240 Ark. 92, 398 S.W.2d 215 (1966).

For purposes of determining the limitations period on claims for additional compensation, injury means the state of facts which first entitled the claimant to compensation, so that if the injury does not develop until some time after the accident, the cause of action does not arise until the injury develops or becomes apparent. *Cornish Welding Shop v. Galbraith*, 278 Ark. 185, 644 S.W.2d 926 (1983); *Freeman v. Tiffany Stand & Furn.*, 20 Ark. App. 183, 726 S.W.2d 294 (1987), appeal dismissed, *American Mut. Ins. Co. v. Argonaut Ins. Co.*, 801 S.W.2d 55 (1991).

The date of the accident and the date of the injury are not necessarily the same. *St. John v. Arkansas Lime Co.*, 8 Ark. App. 278, 651 S.W.2d 104 (1983).

Disability is defined as incapacity because of injury to earn, in the same or any other employment, the wages the employee was receiving at the time of his injury. *Freeman v. Tiffany Stand & Furn.*, 20 Ark. App. 183, 726 S.W.2d 294 (1987),

appeal dismissed, *American Mut. Ins. Co. v. Argonaut Ins. Co.*, 801 S.W.2d 55 (1991).

The date of the accident and the date of the injury are not necessarily the same, because the time of the injury means a compensable injury, and an injury does not become compensable until the claimant suffers a loss in earnings. *Hall's Cleaners v. Wortham*, 38 Ark. App. 86, 829 S.W.2d 424, *aff'd*, 311 Ark. 103, 842 S.W.2d 7 (1992).

Claim for compensation for disability on account of an injury should be barred unless filed within two years of the compensable injury; the date of the compensable injury is defined as the date an injury was caused by an accident as set forth in subdivision (5). *Cromwell v. Univ. of Ark.*, 76 Ark. App. 5, 61 S.W.3d 864 (2001).

Cited: *Heekin Can Co. v. Watson*, 239 Ark. 1152, 396 S.W.2d 929 (1965); *Barentine v. Gleghorn Oil Co.*, 254 Ark. 182, 492 S.W.2d 242 (1973); *Ethridge v. Alexander*

Brown & Associates, 258 Ark. 444, 527 S.W.2d 591 (1975); *Houston Contracting Co. v. Young*, 267 Ark. 44, 589 S.W.2d 9 (1979); *Ashcraft v. Quimby*, 2 Ark. App. 332, 621 S.W.2d 230 (1981); *New Hampshire Ins. Co. v. Logan*, 13 Ark. App. 116, 680 S.W.2d 720 (1984); *Glenn v. Farmers & Merchants Ins. Co.*, 649 F. Supp. 1447 (W.D. Ark. 1986); *Hamilton v. Jeffrey Stone Co.*, 293 Ark. 499, 739 S.W.2d 161 (1987); *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988); *Banquet Foods v. McGlothlin*, 26 Ark. App. 130, 760 S.W.2d 880 (1988); *Arkansas Hwy. & Transp. Dep't v. Gideon*, 28 Ark. App. 84, 770 S.W.2d 677 (1989); *Montgomery v. Delta Airlines*, 31 Ark. App. 203, 791 S.W.2d 716 (1990); *Larzelere v. Reed*, 35 Ark. App. 174, 816 S.W.2d 614 (1991); *Cheshire v. Foam Molding Co.*, 37 Ark. App. 78, 822 S.W.2d 412 (1992); *Vanwagner v. Wal-Mart Stores, Inc.*, 95 Ark. App. 173, 234 S.W.3d 893 (2006).

11-9-703. Preliminary conference procedure.

The Workers' Compensation Commission is authorized and directed to promulgate appropriate rules and regulations to establish and implement, for claims with respect to injuries occurring on or after January 1, 1987, a preliminary conference procedure designed to accomplish the following objectives:

(1) To provide the claimant an opportunity to confer with a legal advisor on the staff of the commission to be advised of his or her rights under this chapter and to ensure that the rights are protected. The conference shall be held in the county where the accident occurred, if the accident occurred in this state, unless otherwise agreed to between the parties, or otherwise directed by the commission;

(2) To provide an opportunity for, but not to compel, a binding settlement of some or all the issues present at the time;

(3) To facilitate the resolution of issues without the expense of litigation or attorney's fees for either party;

(4)(A)(i) To authorize the legal advisor to approve compromise settlements entered into at or as a result of the preliminary conference and those joint petition settlements entered into pursuant to § 11-9-805.

(ii) Provided, however, the same legal advisors shall not both advise the claimant and approve the joint petition.

(B) The purpose and intent of this section is to affirm the duty of the commission to provide legal assistance, thereby reducing litigation and workers' compensation costs; and

(5) No moneys appropriated by Act 1046 of 1987 or any other act shall be expended to fund preliminary conferences held pursuant to § 11-9-102, § 11-9-205, §§ 11-9-501 — 11-9-503, § 11-9-517, § 11-9-521, § 11-9-522, § 11-9-527, §§ 11-9-701 — 11-9-704, § 11-9-715, § 11-

9-802, or § 11-9-804, other than in the county where the accident occurred, if the accident occurred in this state, the county of the claimant's residence, or such other county as agreed to by the parties.

History. Acts 1986 (2nd Ex. Sess.), No. 10, § 11; A.S.A. 1947, § 81-1323.1; Acts 1993, No. 796, § 28; 2003, No. 227, § 10.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided, in part: "Nothing in the act, which originated as House Bill 2646 of

2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

Cited: Harrington Constr. Co. v. Williams, 45 Ark. App. 126, 872 S.W.2d 426 (1994).

11-9-704. Proceedings on claims.

(a) NOTICE. Within ten (10) days after a claim for compensation has been filed, the Workers' Compensation Commission shall notify the employer and any other interested person of the filing of the claim.

(b) INVESTIGATION — HEARING. (1) The commission shall make or cause to be made such investigation as it considers necessary in respect to the claim, and upon application of any interested party, or on its own motion, shall order a hearing.

(2) An application for a hearing must set forth clearly the specific issues of fact or law in controversy and the contentions of the party applying for the hearing.

(3) If any party is not represented by a lawyer, the administrative law judge shall define the issues to be heard.

(4)(A) If a hearing on the claim is ordered, the commission shall give the claimant and other interested parties ten (10) days' notice of the hearing served personally upon the claimant and other parties, or by registered mail.

(B) The hearing shall be held in the county where the accident occurred, if the accident occurred in this state, unless otherwise agreed to between the parties, or otherwise directed by the commission. If the accident occurred without the State of Arkansas, and is one for which compensation is payable under this subchapter, the hearing may be held in the county of the employer's residence or place of business, or any other county in the State of Arkansas which will, in the discretion of the commission, be most convenient for the hearing.

(5) The award, together with the statement of the findings of fact and other matters pertinent to the issues, shall be filed with the record of the proceedings, and a copy of the award shall immediately be sent to the parties in dispute or to their attorneys.

(6)(A) If an application for review is filed in the office of the commission within thirty (30) days from the date of the receipt of the award, the full commission shall review the evidence or, if deemed

advisable, hear the parties, their representatives, and witnesses, and shall make awards, together with its rulings of law, and file same in like manner as specified in the foregoing.

(B) A copy of the award made on review shall immediately be sent to the parties in dispute, or to their attorneys.

(7) The full commission may remand to a single member of the commission or administrative law judge any case before the full commission for the purpose of taking additional evidence. The evidence shall be delivered to the full commission and shall be taken into consideration before rendering any decision or award in the case.

(c) EVIDENCE AND CONSTRUCTION. (1)(A)(i) At the hearing the claimant and the employer may each present evidence in respect of the claim and may be represented by any person authorized in writing for such purpose.

(ii) The evidence may include verified medical reports which shall be accorded such weight as may be warranted from all the evidence of the case.

(B) Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings.

(2) When deciding any issue, administrative law judges and the commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence.

(3) Administrative law judges, the commission, and any reviewing courts shall construe the provisions of this chapter strictly.

(4) In determining whether a party has met the burden of proof on an issue, administrative law judges and the commission shall weigh the evidence impartially and without giving the benefit of the doubt to any party.

(d) ORDER. The order denying the claim or making the award shall be filed in the office of the commission, and a copy shall be sent by registered mail to the claimant and to the employer or to their attorneys.

(e) AWARD AFTER DEATH. (1) No compensation for disability of an injured employee shall be payable for any period beyond his or her death.

(2) However, an award of compensation for disability may be made after the death of the injured employee for the period of disability preceding death.

History. Init. Meas. 1948, No. 4, § 23, Acts 1949, p. 1420; Acts 1981, No. 290, § 10; 1986 (2nd Ex. Sess.), No. 10, § 10; A.S.A. 1947, § 81-1323; Acts 1991, No. 786, § 10; 1993, No. 796, § 29.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall im-

pliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Publisher's Notes. Acts 1991, No. 786, § 37, provided, "The enactment and adoption of this Act shall not repeal, expressly or impliedly, the acts passed at the regular session of the 78th General Assembly. All

such acts shall have full effect and, so far as those acts intentionally vary from or conflict with any provision contained in this Act, those acts shall have the effect of

subsequent acts and as amending or repealing the appropriate parts of the Arkansas Code of 1987."

RESEARCH REFERENCES

Ark. L. Notes. Norwood, "Hi ho, hi ho, it's off to work we go." The 1993 Arkansas Workers' Compensation Code and the "Performing Work" Doctrine, 2007 Ark. L. Notes 91.

Ark. L. Rev. Conflict of Laws: Arkansas, 32 Ark. L. Rev. 1.

Leflar, Compensation for Work-Related Illness in Arkansas, 41 Ark. L. Rev. 89.

U. Ark. Little Rock L. Rev. Annual Survey of Caselaw, Workers' Compensation Law, 24 U. Ark. Little Rock L. Rev. 1115.

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Constitutionality.

By allowing the Workers' Compensation Commission to review the evidence or, if

deemed advisable, hear the parties, their representatives, and witnesses, subsection (b)(6)(A) adequately protects a claimant's due process rights; thus, the commission does not err and violate a claimant's right to due process by substituting its own credibility determinations for that of the law judge. *Stiger v. State Line Tire Serv.*, 72 Ark. App. 250, 35 S.W.3d 335 (2000).

Construction.

Both the Commission and the court are required to construe the provisions of the Workers' Compensation Act liberally, in accordance with its remedial purposes; however, liberal construction does not mean enlargement or restriction of any plain provision of the law. If a statutory provision is plain and unambiguous, it is the duty of the court to enforce it as it is written. *Holiday Inn-West v. Coleman*, 31 Ark. App. 224, 792 S.W.2d 345 (1990).

In determining whether a condition is an injury or occupational disease, where the ambiguity of the statutory language permits alternative interpretations, the workers' compensation commission and courts should generally resolve the ambiguity in favor of claimants as mandated by subsection (c). *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

Workers' compensation statutes are to be liberally construed in accordance with the law's remedial purposes. *Reeder v. Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992); *Deffenbaugh Indus. v. Angus*, 39 Ark. App. 24, 832 S.W.2d 869 (1992), *aff'd*, 313 Ark. 100, 852 S.W.2d 804 (1993).

The word "objective" in subdivision (c)(1) means based on observable phenomena. *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), superseded by statute as stated in, *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

When considering the requirement under subdivision (c)(1) that "any determination of physical impairment shall be supported by objective and measurable physical or mental findings," the word "determination" refers to the Workers' Compensation Commission's determination. *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), superseded by statute as stated in, *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

An initiative petition filed under Ark. Const. Amend. 7 was insufficient because the ballot title was misleading due to various omissions and misstatements in its terms, particularly with respect to its hidden amendments of § 11-9-715, regarding attorney's fees, and this section, regarding the construction of this chapter. *Bailey v. McCuen*, 318 Ark. 277, 884 S.W.2d 938 (Ark. 1994).

Administrative law judges, the Commission, and any reviewing courts are to construe this chapter strictly. *Amlease, Inc. v. Kuligowski*, 59 Ark. App. 261, 957 S.W.2d 715 (1997).

Prior to the 1993 amendment of this section, workers' compensation provisions were construed liberally. *Lawhon Farm Servs. v. Brown*, 60 Ark. App. 64, 958 S.W.2d 538 (1997), *aff'd*, 335 Ark. 272, 984 S.W.2d 1 (1998).

Even though it was true that the Workers' Compensation Act had to be strictly construed, that construction had to take into account the express purpose of the act which was to pay benefits to all legitimately injured workers suffering an injury on the job in order to enable them to return to the work force; thus, the claimant was entitled to benefits where he requested that the employer provide medical benefits, the employer refused to do so, and the worker stayed on the job and tried to work through the pain since the worker did not "return to work" as that term was contemplated under the act. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Strict construction of Acts 1993, No. 793, does not require that courts review workers' compensation claims and appeals as simply a matter of determining whether the worker was performing a job task when the accident occurred; rather, courts must determine whether an injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest directly or indirectly. *Wallace v. West Fraser South, Inc.*, 365 Ark. 68, 225 S.W.3d 361 (2006).

In order to establish liability on the part of a freight lessor, a freight carrier, and a healthcare company under § 11-9-105(b), a truck driver, who injured his back while disconnecting a trailer from his truck, was required to demonstrate negligence on their part since, under the plain meaning of § 11-9-105(b), the no-fault theory of workers' compensation did not carry over to suits filed in tort. The statute did not state that suits filed in tort were to be based on a theory of strict liability, and under the rule of strict construction, no such intent could be inferred. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

Arkansas Workers' Compensation Commission erred in finding that the claim for additional benefits was barred by the statute of limitations, because the conclusion that the entry of the agreed order resolved the request for additional benefits and effectively adjudicated the claim for additional benefits ignored the statutory language allowing for an injured employee to pursue additional benefits when the need indisputably arose within the statutory framework; the case was never dismissed pursuant to § 11-9-702(d), and the agreed order granted a continuing award of benefits which included the physician referral. *Curtis v. Big Lots*, 2009 Ark. App. 292, 307 S.W.3d 37 (2009).

Construing the provisions of the Workers' Compensation Act strictly, the Workers' Compensation Commission abused its discretion in dismissing as untimely a worker's pro se notice of appeal from an order of an administrative law judge (ALJ) denying permanent total disability for carpal tunnel injuries because the ALJ's order could not become final under § 11-9-711(a)(1) until 30 days after the worker received a copy where the worker's

attorney was disbarred 26 days after receiving a copy and thus did not have a full 30 days to appeal. *Kirkendolph v. DF&A Revenue Servs. Div.*, 2009 Ark. App. 629, — S.W.3d — (2009).

Applicability.

Subdivision (c)(3), which was added by Acts 1986 (2nd Ex. Sess.), No. 10 applies in cases where the injury occurred before the effective date of the act, but which were heard by the commission after the effective date. *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987); *Wade v. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989).

Where claim predated the 1993 amendment of subdivision (c)(3) of this section, the court properly declined to apply the new strict standard of construction to its interpretation of the notice provisions of § 11-9-701. *Weyerhaeuser Co. v. Johnson*, 48 Ark. App. 100, 891 S.W.2d 64 (1995).

Compensation claimant's impairment rating was proper because, in part, pursuant to subdivision (c)(ii)(B) of this section and § 11-9-102(16)(A), pain, active range-of-motion, and straight-leg-raising tests could not be used for assessment of impairment in workers' compensation cases. *Flowers v. Ark. State Police*, 2010 Ark. App. 99, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 247 (Mar. 10, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 350 (June 17, 2010).

Appeals.

On appellate review of workers' compensation cases, the evidence is viewed in the light most favorable to the findings of the commission and given its strongest probative value in favor of its order; the extent of inquiry is to determine if the finding of the commission is supported by substantial evidence. Even where a preponderance of the evidence might indicate a contrary result, the court will affirm if reasonable minds could reach the commission's conclusion. *Barrett v. Arkansas Rehabilitation Servs.*, 10 Ark. App. 102, 661 S.W.2d 439 (1983); *Legacy Lodge Nursing Home v. McKellar*, 26 Ark. App. 260, 763 S.W.2d 101 (1989).

When a determination of an administrative law judge is appealed to the commission, the commission does not sit as an appellate court to review the administra-

tive law judge's findings; instead, the commission makes a de novo determination of the facts, and it is the commission's duty to make findings in accordance with the preponderance of the evidence and not to determine whether there is substantial evidence to support the findings of the administrative law judge. *Woods v. Best Western*, 32 Ark. App. 196, 799 S.W.2d 565 (1990).

The commission is authorized to take testimony by deposition or other means under § 11-9-207(a)(10) or to remand the matter to the judge for the purpose of taking additional evidence under subdivision (b)(7) of this section. *Quinn v. Webb Wheel Prods.*, 52 Ark. App. 208, 915 S.W.2d 740 (1996).

—Court of Appeals.

The Court of Appeals may, and should, upon its own motion, certify to the Supreme Court any appeal it finds to be excepted from its jurisdiction by Rule 1-2 of the Rules of the Supreme Court or to involve an issue of significant public interest or a legal principle of major importance, but if the case had been appealed to the Court of Appeals from the Workers' Compensation Commission, the case could not have been certified or transferred to the Supreme Court prior to a decision having been made by the Court of Appeals. *Houston Contracting Co. v. Young*, 267 Ark. 44, 589 S.W.2d 9 (1979).

When a decision of the Workers' Compensation Commission is appealed to the Court of Appeals, that court gives no weight to the findings and conclusions of the administrative law judge. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988).

In workers' compensation cases, the commission conducts a de novo review of the record; it is not its function to review the decision made by the administrative law judge for error. On appeal to the court of appeals, the court reviews the decision of the commission and not that of the administrative law judge; thus, where there is no error in the proceedings before the commission, as opposed to the administrative law judge, the judgment of the commission will be affirmed. *Thornton v. Bruce*, 33 Ark. App. 31, 800 S.W.2d 723 (1990).

—Standard of Review.

On appeal, the court is required to review the evidence in the light most favor-

able to the commission's decision and uphold it if it is supported by substantial evidence; before it reverses a decision of the commission, it must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the commission. *Little v. Delta Rice Mill, Inc.*, 11 Ark. App. 114, 667 S.W.2d 373 (1984); *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992); *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), superseded by statute as stated in, *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

When the issue is whether the Workers' Compensation Commission's findings are supported by substantial evidence, the Court of Appeals must view the evidence in the light most favorable to those findings and give the testimony its strongest probative force in favor of the commission's action. *Tyson Foods, Inc. v. Disheroon*, 26 Ark. App. 145, 761 S.W.2d 617 (1988).

Where the decision of the Workers' Compensation Commission was not supported by the law and evidence as to the holding that there was insufficient evidence of measurable physical findings to support a determination of physical impairment, the decision of the Commission was reversed. *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), superseded by statute as stated in, *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

On appeal of a workers' compensation case from the Court of Appeals, the Supreme Court views the evidence in the light most favorable to the commission's decision and affirms that decision if it is supported by substantial evidence; thus, before the Supreme Court will reverse the commission's decision, it must be convinced that fair-minded persons considering the same facts could not have reached the conclusion made by the commission. *Kuhn v. Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996).

—Timely Appeal.

The filing of a motion for reconsideration, or rehearing, does not extend the time to file the notice of appeal; a motion for reconsideration, or rehearing, may be acted upon within the 90-day period in which the record on appeal must be filed

and docketed. *Morrison v. Tyson Foods, Inc.*, 11 Ark. App. 161, 668 S.W.2d 47 (1984).

—Timely Filing of Documents.

The attorney's duty to ensure that documents which must be timely filed have been timely received may require transmitting the documents earlier in the time period to allow for a follow-up phone call and further transmission within the filing period if the previous notice of appeal or other document was somehow not received. *Tracor/MBA v. Flowers*, 41 Ark. App. 186, 850 S.W.2d 30 (1993).

Attorney's Fees.

Section § 11-9-715(b)(1) neither expressly provides for nor expressly prohibits an additional award of attorney's fees in cases where the claimant has been required to defend his award of workers' compensation benefits through two separate appeals brought by the employer; construing the attorney's fees provision liberally and in accordance with the remedial purposes given in subdivision (c)(3) of this section, an additional award of attorney's fees is authorized. *Cagle Fabricating & Steel, Inc. v. Patterson*, 43 Ark. App. 79, 861 S.W.2d 114 (1993).

Capacity to Earn.

The question of capacity to earn during the healing period is not the same as the determination of "physical impairment" referred to in subdivision (c)(1). *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993).

Death.

Reference to this section in an oral argument settled the point argued in the brief of appellant that all unpaid compensation benefits awarded decedent abated by reason of his death and, accordingly, the commission's award would be modified by cancelling all of the permanent partial award subsequent to date of death. *Dockery v. Thomas*, 229 Ark. 984, 320 S.W.2d 257 (1959).

Pursuant to subsection (e) liability to an employee from his employer for compensation for disability does not survive to the employee's estate after his death. *Zuercher v. Emerson Elec. Co.*, 31 Ark. App. 124, 789 S.W.2d 467 (1990).

Determination.

The word "determination" as used in this section refers to the commission's

determination of physical impairment, not the doctor's determination. *Reeder v. Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992).

Subdivision (c)(1) of this section provides that objective and measurable findings are necessary to support a determination of physical impairment, but they are not necessary to support a determination of wage loss disability. *Brantley v. Tyson Foods, Inc.*, 48 Ark. App. 27, 887 S.W.2d 543 (1994).

The Commission had a substantial basis for denial of permanent disability benefits as the Commission's decision that the employee was not permanently disabled was based upon the fact that the impairment rating assigned by his treating physician was not supported by objective measurable physical findings and that the opinion of another physician, who evaluated the employee once, was entitled to greater weight as it was consistent with functional capacity evaluations performed on the employee. *Vite v. Vite*, 2010 Ark. App. 565, — S.W.3d — (2010).

Arkansas Workers' Compensation Commission's finding on permanent impairment was supported by substantial evidence as the claimant's treating physician found he had an 88% impairment under the American Medical Association Guides, and the claimant testified that he did have some functional use of his left arm. *Main v. McGehee Metals*, 2010 Ark. App. 585, — S.W.3d — (2010).

—Findings of impairment.

Physician's determination of impairment was not upheld where only range-of-motion tests were performed. *Department of Parks & Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998).

Objective medical evidence, including pulmonary function test results and a doctor's opinion, showed that employee seeking workers' compensation had a 50% impairment due to silicosis and, for the purposes of this section and § 11-9-102(16)(A)(i), the pulmonary-function test was an objective test despite the fact that employee was at least partially able to control his breathing and may not have made a full effort during each breathing test. *DeQueen Sand & Gravel Co. v. Cox*, 95 Ark. App. 234, 236 S.W.3d 5 (2006).

—Rapid Repetitive Motion.

The decisions in both *Kildow v. Baldwin Piano & Organ*, 58 Ark. App. 194, 948

S.W.2d 100 (1997) and *Lay v. United Parcel Serv.*, 58 Ark. App. 35, 944 S.W.2d 867 (1997) should be used to determine whether a particular activity constitutes rapid repetitive motion. *Rudick v. Unifirst Corp.*, 60 Ark. App. 173, 962 S.W.2d 819 (1998).

In General.

—Medical.

Medical evidence insufficient to support award for injury. *Johnson v. Little Rock Furn. Mfg. Co.*, 206 Ark. 1016, 178 S.W.2d 249 (1944) (decision under prior law); *Foster v. Fort Smith Cotton Oil Co.*, 224 Ark. 394, 273 S.W.2d 529 (1954); *Grimsley v. Manufacturers Furn. Co.*, 224 Ark. 769, 276 S.W.2d 64 (1955); *McFall v. Farmers Tractor & Truck Co.*, 227 Ark. 985, 302 S.W.2d 801 (1957); *Shipp v. Tanner Estate*, 229 Ark. 815, 318 S.W.2d 821 (1958).

An employee must object to the failure to verify a doctor's report on the cause of disability when the case is before the commission so that it can be verified and the doctor cross-examined. *Foster v. Fort Smith Cotton Oil Co.*, 224 Ark. 394, 273 S.W.2d 529 (1954).

A doctor's report, even though properly verified, is only entitled to such weight as may be warranted from all the evidence in the case. *Boyd Excelsior Fuel Co. v. McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956).

Doctor's reports which were not verified as required by statute but to which no objections were made and no opportunity for cross-examination afforded were only entitled to such weight as was warranted from all the facts of the case. *Boyd Excelsior Fuel Co. v. McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956).

Commission was in error in holding that employee's healing period terminated several months prior to date of physician's contrary testimony. *Hamilton v. Kelley-Nelson Constr. Co.*, 228 Ark. 612, 309 S.W.2d 323 (1958).

It was proper for expert medical witnesses to give their opinion on basis of information contained in autopsy report and hospital record. *Holstein v. Quality Excelsior Coal Co.*, 230 Ark. 758, 324 S.W.2d 529 (1959).

Where pivotal question of fact as to the exact cause of medical condition could not be resolved by any witness with complete certainty, conflicts in proof had a bearing

on the testimony of each witness but did not have effect of depriving testimony of all substantiality. *Holstein v. Quality Excelsior Coal Co.*, 230 Ark. 758, 324 S.W.2d 529 (1959).

Since autopsy reports and clinical histories are statements of fact rather than expressions of an opinion, they are admissible. *Rhea v. M-K Grocer Co.*, 236 Ark. 615, 370 S.W.2d 33 (1963).

Commission did not err in admitting letter of physician expressing medical opinion where physician subsequently testified and was available for cross-examination. *Potlatch Forests, Inc. v. Funk*, 239 Ark. 330, 389 S.W.2d 237 (1965).

Medical evidence sufficient to support award for injury. *Sneed v. Colson Corp.*, 254 Ark. 1048, 497 S.W.2d 673 (1973).

In a hearing before the commission, a physician's letter report to the claimant's attorney could be admitted into evidence and accorded such weight as was warranted from all the evidence. *Meadors Lumber Co. v. Wysong*, 262 Ark. 425, 557 S.W.2d 395 (1977).

Inasmuch as the commission was not bound by civil rules of evidence in its admission and consideration of evidence, the commission was within its discretion in hearing the testimony of a doctor on the issue of whether an employee's fatal heart attack was the result of his employment, despite the fact that the testimony was in conflict with the opinions of more celebrated experts. *Barksdale Lumber Co. v. McAnally*, 262 Ark. 379, 557 S.W.2d 868 (1977).

Where letter written by doctor was more in the nature of advocacy than a medical opinion and was of questionable admissibility, and the opinion of the commission showed that the letter was disregarded for purpose of arriving at its decision, carrier was not entitled to complain that the commission erred in admitting the letter into evidence. *Browning's Restaurant v. Kuykendall*, 263 Ark. 374, 565 S.W.2d 33 (1978).

While a physician's opinion is not conclusive or binding on the commission, an administrative body like the commission is not granted leeway to arbitrarily disregard a witness's testimony. *Wade v. Mr. C. Cavanaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988), superseded, 298 Ark. 363, 768 S.W.2d 521 (1989).

Workers' compensation claimant must prove a causal connection between the work-related accident and the later disabling injury, but it is not essential that the causal relationship between the accident and the disability be established by medical evidence, nor is it necessary that employment activities be the sole cause of a workers' injury in order to receive compensation benefits. *Bates v. Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1992).

Commission is not bound by medical opinion, although it may not arbitrarily disregard the testimony of any witness. It is also entitled to examine the basis for a doctor's opinion, like that of any other expert, in deciding the weight to which that opinion is entitled. *Reeder v. Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992).

This section does not require that the commission automatically reject a doctor's opinion as to permanent impairment merely because the doctor has used American Medical Association guides as a basis for opinion or because the doctor himself describes the bases for his opinion as "subjective". *Reeder v. Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992).

The Commission may not arbitrarily disregard a physician's opinion, especially when that opinion is based on objective and measurable findings. *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996).

—Record.

The Workers' Compensation Commission can, and indeed, should, consult the AMA Guides to the Evaluation of Permanent Impairment when determining the existence and extent of permanent impairment, whether or not the relevant portions of the guides have been offered into evidence by either party. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

—Subpoena for Witnesses.

It was prejudicial error for judge to refuse subpoenas at the request of claimant for witnesses. *Chambers v. Jerry's Dep't Store, Inc.*, 269 Ark. 592, 599 S.W.2d 448 (Ct. App. 1980).

Evidence.

Arkansas Workers' Compensation Commission was not free to reject an employ-

ee's treating physician's opinion as to causation simply because it was based on the employee's history, absent a finding that the history given was inaccurate or not credible. *Roberts v. Whirlpool*, 102 Ark. App. 284, 284 S.W.3d 100 (2008).

Arkansas Workers' Compensation Commission erred in holding that an employee was entitled to implantation of a dorsal-column stimulator if additional testing and examination showed it to be necessary because the Commission failed to hold the employee to the statutory burden of proof under subdivision (c)(2) of this section by awarding additional medical care while simultaneously opining that the employee needed to return to the doctor for further evaluation before that care could be deemed reasonable and necessary. *Sea Ark Marine, Inc. v. Pippinger*, 2009 Ark. App. 223, 303 S.W.3d 102 (2009).

There was evidence that an employee told another employee and a doctor that the employee's back injury occurred over a weekend while bike riding, the employee had never stated to either the company doctor or the employee's own doctor that the source of the back injury was caused by repetitive job duties and/or by specific incident, and the Workers' Compensation Commission did not find the employee's testimony as to the work-related source of the back injury credible; therefore, the employee had not met her burden of proving a compensable work-related injury. *Alecia Clark v. San Antonio Shoes, Inc. Commerce Indst. Ins. Co.*, 2009 Ark. App. 689, — S.W.3d — (2009).

Workers' compensation claimant failed to prove by a preponderance of the evidence that impairment ratings to the left hand and elbow were associated with a work-related injury because the claimant failed to cite any medical authority for such a connection, instead presenting only the claimant's own testimony and subjective responses to active range-of-motion testing. *Wilson v. Smurfit*, 2009 Ark. App. 800, — S.W.3d — (2009).

Any determination of the existence or extent of physical impairment must be supported by objective and measurable physical findings pursuant to subdivision (c)(1)(B) of this section. The Arkansas Workers' Compensation Commission is authorized to decide which portions of the medical evidence to credit and to translate

this medical evidence into a finding of permanent impairment using the American Medical Association Guides. *Dillard's, Inc. v. Johnson*, 2010 Ark. App. 138, — S.W.3d — (2010).

Substantial evidence supported the Workers' Compensation Commission's determination that an employee failed to show that his low back pain and surgery were caused by a 15-foot fall he had suffered at work five months earlier; he failed to complain of back pain for five months despite many visits to doctors and therapists, and was performing difficult tasks around his home and farm despite being advised against doing so. *Howell v. Automated Conveyor Sys.*, 2010 Ark. App. 761, — S.W.3d — (2010).

Because an employee failed to prove a permanent impairment under subdivision (c)(1)(B) of this section and § 11-9-102(16)(A)(i), and because the Workers' Compensation Commission could consider the conflicting medical evidence and give less weight to one opinion, there was substantial evidence to support the denial of the employee's claim for workers' compensation benefits. *Pruitt v. Healthsouth Corp.*, 2011 Ark. App. 776, — S.W.3d — (2011).

Employee whose feet became infected, allegedly due to water run-off on his apron and shoes during his employment at a poultry plant, failed to carry his burden under subsection (c) of this section of proving that the infection and hospitalization was caused by exposure to water at work, as opposed to a continuation of a preexisting diabetic infection for which the employee had been hospitalized a month earlier. *Serrano v. George's and Corckett Adjustment*, 2011 Ark. App. 784, — S.W.3d — (2011).

In a workers' compensation case, a five-percent permanent-partial disability rating was supported by substantial evidence because there was reliance upon a medical report for objective findings to support the rating. The major cause of the rating was a compensable thoracic injury, which required surgical intervention. *Walgreen Co. v. Goode*, 2012 Ark. App. 196, — S.W.3d — (2012).

—In General.

Evidence insufficient to find that claimant suffered compensable, work-related injury. *Fordyce Lumber Co. v. Shelton*, 206

Ark. 1134, 179 S.W.2d 464 (1944) (preceding cases decided under prior law); *Pruitt v. Moon*, 230 Ark. 986, 328 S.W.2d 71 (1959).

Evidence sufficient to find that claimant suffered compensable, work-related injury. *Garrison Furn. Co. v. Butler*, 206 Ark. 702, 177 S.W.2d 738 (1944); *Kloss v. Ford, Bacon & Davis*, 207 Ark. 115, 179 S.W.2d 172 (1944) (preceding cases decided under prior law); *Frank Lyon Co. v. Scott*, 215 Ark. 274, 220 S.W.2d 128 (1949); *Tri-States Constr. Co. v. Worthen*, 224 Ark. 418, 274 S.W.2d 352 (1955); *Edgington v. City Elec. Co.*, 237 Ark. 804, 376 S.W.2d 550 (1964); *Fireman's Fund Ins. Co. v. Hill*, 255 Ark. 73, 498 S.W.2d 865 (1973).

On compensation claim by employee who was injured at work, claimant was entitled to have facts submitted to commission on any provision of law which would justify award in his favor. *Triebisch v. Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951).

Whether there is substantial evidence to support the findings of the Workers' Compensation Commission is a matter of law. *Boyd Excelsior Fuel Co. v. McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956).

On an appeal to the full commission presented solely on the transcript of the record made before the referee, it is the duty of the commission to make a finding according to the preponderance of the evidence and not merely whether there is substantial evidence to support the finding of the referee, and it may pass upon the credibility of the witnesses. *Moss v. El Dorado Drilling Co.*, 237 Ark. 80, 371 S.W.2d 528 (1963); *Potlatch Forests, Inc. v. Smith*, 237 Ark. 468, 374 S.W.2d 166 (1964); *Arkansas Coal Co. v. Steele*, 237 Ark. 727, 375 S.W.2d 673 (1964).

Commission has broad discretion with reference to admission of evidence. *Potlatch Forests, Inc. v. Funk*, 239 Ark. 330, 389 S.W.2d 237 (1965).

Even though evidence might support a contrary conclusion, there is no requirement that a finding by the commission be based on evidence which is mathematically or medically certain; thus, were evidence showed that claimant's infarction and bypass surgery could have been caused by events at work and commission found that it was, its findings would be affirmed. *Kempner's & Dodson Ins. Co. v.*

Hall, 7 Ark. App. 181, 646 S.W.2d 31 (1983).

Decisions of the Workers' Compensation Commission must stand if supported by substantial evidence and, in determining sufficiency of evidence to sustain findings of the commission, testimony must be weighed in its strongest light in favor of the commission's findings. *Central Maloney, Inc. v. York*, 10 Ark. App. 254, 663 S.W.2d 196 (1984).

It is the duty of the commission to make a finding according to a preponderance of the evidence, and not whether there is any substantial evidence to support the ruling of the referee. *Wade v. Mr. C. Cavanaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988), superseded, 298 Ark. 363, 768 S.W.2d 521 (1989).

The commission could reasonably infer from the evidence that, at the time of the plane crash, the decedent was performing one of the duties of his employment in inspecting farm crops while returning from a plane trip of a personal nature. While it was true that no one could be absolutely certain what the decedent was doing at the time of his death, absolute certainty is not required. *Franklin Collier Farms v. Bullard*, 33 Ark. App. 33, 800 S.W.2d 438 (1990).

The commission's decision was supported by substantial evidence. *Franklin Collier Farms v. Bullard*, 33 Ark. App. 33, 800 S.W.2d 438 (1990).

So long as the record contains objective and measurable findings to support the commission's ultimate determination, consideration of the claimant's testimony about her symptoms, including pain, and the effect of activity on those symptoms, is not prohibited by this section. *Taco Bell v. Finley*, 38 Ark. App. 11, 826 S.W.2d 313 (1992).

Law judge's opinion, adopted by the Workers' Compensation Commission, was not supported by substantial evidence. *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992).

—Additional Evidence.

Request that the commission remand his case to the administrative law judge for the taking of additional evidence bearing on his total disability should have been granted. *Haygood v. Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982).

A case should only be remanded by the compensation commission if the newly

discovered evidence is relevant, is not merely cumulative, would change the result, and was diligently discovered and produced by the movant. *Johnson v. American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992).

The following are prerequisites for remand by the full commission on proffer to present newly discovered evidence: (1) The newly discovered evidence must be relevant; (2) it must not be cumulative; (3) it must change the result; and (4) the party seeking to introduce the evidence must be diligent. *Quinn v. Webb Wheel Prods.*, 52 Ark. App. 208, 915 S.W.2d 740 (1996).

Substantial evidence supported Workers' Compensation Commission's finding that claimant acted diligently in obtaining the additional medical evidence and that claimant sustained a compensable injury; the December 2001 MRI report and the February 2002 operative report, both introduced at the second hearing, constituted sufficient evidence to uphold the findings. *Hargis Transp. v. Chesser*, 87 Ark. App. 301, 190 S.W.3d 309 (2004).

—Burden of Proof.

Burden of proof is upon claimant to show that injury or death was the result of an accident incurred in and growing out of the course of employment. *Pearson v. Faulkner Radio Serv. Co.*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Lybrand v. Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979); *Bates v. Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1992).

The Worker's Compensation Commission did not err in applying the preponderance of the evidence standard of proof in connection with the establishment by the employee of a causal connection between the false representation by the employee claimant on her employment application and the subsequent injury to the employee; there is no rule that an employer must prove a causal connection between the misrepresentation and the injury by clear and convincing evidence. *Tahutini v. Tastybird Foods*, 18 Ark. App. 82, 711 S.W.2d 173 (1986).

Acts 1986 (2nd Ex. Sess.), No. 10 which added the language of subdivision (c)(3) effected a procedural change and not a substantive change regarding the burden of proof. Rule of liberal construction as it

existed prior to the 1986 amendment to this section was not a substitute for a claimant's burden of establishing an injury by a preponderance of the evidence. *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

Before the 1986 amendment to subsections (b) and (c), it was the rule that the Workers' Compensation Commission, in making a factual determination, was to give the claimant the benefit of the doubt. But this rule requiring the commission to resolve doubtful cases in favor of the claimant did not mean that a claimant did not have the burden of proving his case by a preponderance of the evidence. *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

The party having the burden of proof on an issue must establish it by a preponderance of the evidence. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988).

The commission must weigh the evidence impartially and without giving the benefit of the doubt to any party when determining whether a party has met the burden of proof on an issue. *Wade v. Mr. C. Cavanaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988), superseded, 298 Ark. 363, 768 S.W.2d 521 (1989).

In worker's compensation cases, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (1988).

The characterization of claimant's injury affects the burden of proof. If claimant's condition is an "injury," she has the burden of proving that it arose out of and in the course of her employment by a preponderance of the evidence; but if her condition is an "occupational disease," a causal connection between the employment and the disease must be established by clear and convincing evidence. *Tyson Foods, Inc. v. Watkins*, 31 Ark. App. 230, 792 S.W.2d 348 (1990).

The evidence is to be weighed impartially, without giving the benefit of the doubt to any party. *Gencorp Polymer Prods. v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (1991).

—Credibility.

Where the commission in denying a workers' compensation claim laid much stress on the credibility of the claimant

and there was evidence in the record upon which the commission could have either approved or denied the claim depending upon the credibility of the witnesses, there was substantial evidence to support its findings. *Burnett v. St. Mary's Hosp.*, 255 Ark. 1023, 505 S.W.2d 24 (1974).

Under the evidence, it could not be argued that the commission refused to accept the judge's version without making a finding as to credibility. *Dedmon v. Dillard Dep't Stores, Inc.*, 3 Ark. App. 108, 623 S.W.2d 207 (1981).

Where there was no dispute between the administrative law judge and the compensation commission as to any fact, but a disagreement over credibility, a due process of law issue was not presented. *Penter v. Baldwin Piano & Organ Co.*, 309 Ark. 487, 832 S.W.2d 215 (1992), US Supreme Court cert. denied, 506 U.S. 940, 113 S. Ct. 378, 121 L. Ed. 2d 288 (1992).

Arkansas Workers' Compensation Commission erred in rejecting subjective evidence in determining that employee sustained no anatomical impairment as a result of his ankle injury as the injury was supported by objective findings which could not come under the employee's voluntary control. *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W.3d 709 (2006).

—Findings of Impairment.

Objective and measurable physical or mental findings are necessary to support a determination of physical impairment but they are not necessary to support a determination of wage loss disability. *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993); *Arkansas Methodist Hosp. v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Incapacity to earn wages can exist without physical or mental impairment. *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993).

If there is no requirement in subdivision (c)(1) that the award of temporary total disability must be supported by objective and measurable findings of physical impairment, then the absence of factual findings by the Commission on that point does not prevent the determination of the Commission, that employee suffered a compensable injury, from being affirmed. *Arkansas Dep't of Health v. Williams*, 43 Ark. App. 169, 863 S.W.2d 583 (1993).

The word "objective" in subdivision (c)(1) means based on observable phenomena or indicating a symptom or condition perceived as a sign of disease by someone other than the person afflicted. *Harper v. Hi-Way Express*, 51 Ark. App. 183, 912 S.W.2d 21 (1995).

As observations made by a doctor as a result of range of motion tests qualify as "objective physical findings," the commission's refusal to consider positive straight leg raises to constitute objective physical findings was in error. *Harper v. Hi-Way Express*, 51 Ark. App. 183, 912 S.W.2d 21 (1995).

Although the claimant's complaints of pain and headaches were indications over which she had voluntary control and were not to be considered as objective findings, her intracranial bleeding, cranial nerve damage with loss of sense and smell, and the results of her CAT scan were objective findings as required by this section. *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

Workers' Compensation Commission did not disagree with employer's finding that, using AMA's Guides to the Evaluation of Permanent Impairment (AMA Guides) the employee was entitled to a 24 percent impairment rating for a total shoulder arthroplasty and a 10 percent impairment rating for a distal clavicle arthroplasty, or that these ratings combined to produce an impairment rating of 32 percent, however, the employer had misinterpreted Table 27 of the AMA Guides as assigning impairment values only to the shoulder joint, when Table 27 instead assigned impairment values from arthroplasty of specific bones and joints to the entire upper extremity. *Avaya (Lucent Techs.) v. Bryant*, 82 Ark. App. 273, 105 S.W.3d 811 (2003).

Workers' Compensation Commission's decision affirming the administrative law judge's finding that an employee was entitled to permanent anatomical impairment was reversed and remanded where the Commission failed to make the specific findings of fact necessary for the reviewing court to carry out a meaningful review of issues relating to whether the employee's injury was the major cause of his impairment, the permanency of the employee's condition, the assessment of the medical evidence, and the employee's impairment rating. *Excelsior Hotel v.*

Squires, 83 Ark. App. 26, 115 S.W.3d 823 (2003).

Reasonable minds might accept the evidence relied upon by the Arkansas Workers' Compensation Commission as adequate to support the conclusion that the employee suffered from a seizure disorder, entitling her to an additional 14-percent impairment rating, making the total rating 26 percent; the Commission, however, properly rejected a higher whole-person impairment rating of 39 percent. The Commission's decision concluded that the evidence did not demonstrate that the employee sustained any permanent impairment to either upper extremity as a result of her compensable neck injury and surgeries. *Dillard's, Inc. v. Johnson*, 2010 Ark. App. 138, — S.W.3d — (2010).

Hearing.

—Action to Reform Policy.

Action to reform workers' compensation insurance policy was properly brought in chancery court rather than before Workers' Compensation Commission. *American Cas. Co. v. Hambleton*, 233 Ark. 942, 349 S.W.2d 664 (1961).

—Apportionment of Liability.

The apportionment of liability between insurance carriers, where the combined effect of a previous and a subsequent injury causes a disability, is a factual determination to be made by the commission. *Browning's Restaurant v. Kuykendall*, 263 Ark. 374, 565 S.W.2d 33 (1978).

—Final Order.

Where law judge's opinion definitely stated that claimant failed to prove she was entitled to additional benefits, claimant's failure to question the decision within 30 days, either by petition for rehearing or appeal, allowed it to become final. *Smith v. Servomation*, 8 Ark. App. 274, 651 S.W.2d 118 (1983).

Order of administrative law judge became final after a period of 30 days as to the amount of compensation for claimant's attorney and as to the manner in which it was to be paid, and a reopening of the matter was barred by the doctrine of res judicata. *Gwin v. R.D. Hall Tank Co.*, 10 Ark. App. 12, 660 S.W.2d 947 (1983).

Decision of commission became final where no notice of appeal from that decision was filed within 30 days from receipt

of the decision, but commission had authority to grant motion for reconsideration during that period. *Morrison v. Tyson Foods, Inc.*, 11 Ark. App. 161, 668 S.W.2d 47 (1984).

—Findings.

Where commission made no finding on temporary partial disability, case would be remanded to the commission for a definite finding on that issue. *Long-Bell Lumber Co. v. Mitchell*, 206 Ark. 854, 177 S.W.2d 920 (1944) (decision under prior law).

When the commission's findings as to the cause of disability are supported by substantial evidence they have the force and effect of a jury verdict. *Foster v. Fort Smith Cotton Oil Co.*, 224 Ark. 394, 273 S.W.2d 529 (1954).

Under this section, the commission acts as a trier of the facts — i.e., a jury — in drawing the inferences and reaching the conclusions from the facts. The finding of the commission is entitled to the same force and effect as a jury verdict. *Guynn's Estate v. Helena Hosp.*, 240 Ark. 56, 398 S.W.2d 526 (1966).

Where the decision of the commission found that the burden had not been met, on appeal the court only determined whether there was substantial evidence to support the finding of the commission. *Lybrand v. Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979).

It is error for the commission to confine its review to a single issue; it must review the record as a whole and make its own de novo review and specific findings of fact. *White v. Air Sys., Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990).

When compensation is denied, the commission must make findings sufficient to justify that denial, and when the commission fails to make specific findings upon which it relies to support its decision, reversal and remand of the case is appropriate. *White v. Air Sys., Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990).

After conducting a de novo review, the commission may adopt the administrative law judge's findings which are identical to those arrived at by the commission. *ITT/Higbie Mfg. v. Gilliam*, 34 Ark. App. 154, 807 S.W.2d 44 (1991).

Compensation commission must make sufficient factual findings to justify the

decision made, and may satisfy this standard by adopting an opinion of the law judge which contains adequate findings. *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992).

Observations made by a doctor as a result of range of motion tests qualify as "objective physical findings" under subdivision (c)(1). *Keller v. L.A. Darling Fixtures*, 40 Ark. App. 94, 845 S.W.2d 15 (1992), superseded by statute as stated in, *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

—Jurisdiction.

An Arkansas resident who entered into an employment contract with a corporation maintaining an office in Arkansas having control over the employment which was not at any fixed location came under this chapter, even though his injury occurred in another state in which all of his employment was performed. *International Paper Co. v. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971).

—Motion for Rehearing.

Absent a showing that the Workers' Compensation Commission acted arbitrarily and capriciously, or abused its discretion, a determination made by the commission not to reopen a case will not be disturbed. *Walker v. J & J Pest Control*, 6 Ark. App. 171, 639 S.W.2d 748 (1982).

Where the claimant filed a petition for a rehearing of the denial of disability benefits on the ground that there had been newly discovered evidence, but it appeared that all of the evidence which the claimant alleged was newly discovered evidence was actually within the knowledge of the claimant before the case was submitted to and decided by the commission, the motion for a rehearing was properly denied. *Walker v. J & J Pest Control*, 6 Ark. App. 171, 639 S.W.2d 748 (1982).

—Oral Argument.

Subdivision (b)(6) of this section clearly allows for oral argument only when the commission deems it advisable. *Bartlett v. Mead Containerboard*, 47 Ark. App. 181, 888 S.W.2d 314 (1994).

Where claimant requested oral argument but failed to notify the commission as to why one was desired, the commission had no basis upon which to deem an oral argument advisable because no reason was given as to why the case could not be

decided on the proof presented to the administrative law judge. *Bartlett v. Mead Containerboard*, 47 Ark. App. 181, 888 S.W.2d 314 (1994).

Investigation.

By reserving the issue of whether the employee was entitled to temporary total disability benefits, the commission simply declined to say that the employee failed to meet her burden of proof on this issue, and this constituted error on the part of the commission, as the workers' compensation statute states that the evidence shall be weighed impartially, and without giving the benefit of the doubt to any party. *Gencorp Polymer Prods. v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (1991).

The specific authority to investigate claims granted to the Commission by subdivision (b)(1) of this section carries also the authority to make such orders and impose such sanctions as are reasonably necessary to carry out that purpose. *Harrington Constr. Co. v. Williams*, 45 Ark. App. 126, 872 S.W.2d 426 (1994).

Notice.

Workers' Compensation Commission erred in finding that company was agent of employer designated to receive notice under this section. *Whirlpool Corp. v. Kaelin*, 19 Ark. App. 331, 720 S.W.2d 722 (1986).

"Physical Impairment".

The reference to "physical impairment" in subdivision (c)(1) of this section refers to a determination of anatomical disability as opposed to a loss of a wage earning capacity under § 11-9-522(b). *Arkansas Methodist Hosp. v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The term "anatomical impairment" means the anatomical loss as reflected by the common usage of medical impairment ratings; wage-loss disability is something entirely different. *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996).

Arkansas Workers' Compensation Commission wrongfully denied employee permanent disability benefits where there were objective findings to support an impairment; spinal stenosis, or narrowing of the spine, was detected on a myelogram and CT scan, and such a finding clearly was not within the voluntary control of the patient. *Pollard v. Meridian Aggre-*

gates, 88 Ark. App. 1, 193 S.W.3d 738 (2004).

Cited: Ward Furn. Mfg. Co. v. Reather, 234 Ark. 151, 350 S.W.2d 691 (1961); Tri State Ins. Co. v. Employers Mut. Liab. Ins. Co., 254 Ark. 944, 497 S.W.2d 39 (1973); Ethridge v. Alexander Brown & Associates, 258 Ark. 444, 527 S.W.2d 591 (1975); Davis v. C & M Tractor Co., 4 Ark. App. 34, 627 S.W.2d 561 (1982); Fraternal Order of Eagles v. Kirby, 6 Ark. App. 198, 639 S.W.2d 529 (1982); Odom v. Tosco Corp., 12 Ark. App. 196, 672 S.W.2d 915 (1984); Kifer v. Liberty Mut. Ins. Co., 777 F.2d 1325 (8th Cir. 1985); Lambert v. Gerber Prods. Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Marrable v. Southern LP Gas, Inc., 25 Ark. App. 1, 751 S.W.2d 15 (1988); Myles v. Paragould Sch. Dist., 28 Ark. App. 81, 770 S.W.2d 675 (1989); Driscoll v. Oklahoma Gas & Elec. Co., 28 Ark. App. 352, 775 S.W.2d 84 (1989); Pinkston v. General Tire & Rubber Co., 30 Ark. App. 46, 782 S.W.2d 375 (1990); Weyerhaeuser Co. v. McGinnis, 37 Ark. App. 91, 824 S.W.2d 406 (1992); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994); St. Vincent Infirmary Medical Ctr. v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996); Cook v. Recovery Corp., 322 Ark. 707, 911 S.W.2d 581 (1995); Hanson v. Amfuel, 54 Ark. App. 370, 925 S.W.2d 166 (1996); Dugan v. Jerry Sweetster, Inc., 54 Ark. App. 401, 928 S.W.2d 341 (1996); Duke v. Regis Hairstylists, 55 Ark. App. 327, 935 S.W.2d 600 (1996); Olsten Kimberly Quality Care v. Pettey, 55 Ark. App.

343, 934 S.W.2d 956 (1996); Weaver v. Whitaker Furn. Co., 55 Ark. App. 400, 935 S.W.2d 584 (1996); City of Blytheville v. McCormick, 56 Ark. App. 149, 939 S.W.2d 855 (1997); Johnson v. Democrat Printing & Lithograph, 57 Ark. App. 274, 944 S.W.2d 138 (1997); Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997); Tillman v. Baldwin & Shell Constr., 58 Ark. App. 177, 948 S.W.2d 118 (1997); Morrilton Manor v. Brimmage, 58 Ark. App. 252, 952 S.W.2d 170 (1997); Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997); Hope Livestock Auction Co. v. Knighton, 62 Ark. App. 74, 966 S.W.2d 943 (1998); Second Injury Fund v. Furman, 62 Ark. App. 194, 972 S.W.2d 255 (1998); Shults v. Pulaski County Special Sch. Dist., 63 Ark. App. 171, 976 S.W.2d 399 (1998); Smith v. Chemical Leaman Tank Lines, 285 F.3d 750 (8th Cir. 2002); Marshall v. Madison County, 81 Ark. App. 57, 98 S.W.3d 452 (2003); Garcia v. A&M Roofing, 89 Ark. App. 251, 202 S.W.3d 532 (2005); Automated Conveyor Sys. v. Dooley, 360 Ark. 218, 200 S.W.3d 442 (2004); Teasley v. Hermann Cos., 92 Ark. App. 40, 211 S.W.3d 40 (2005); Rutherford v. Mid-Delta Cmty. Servs., 102 Ark. App. 317, 285 S.W.3d 248 (2008); Curt Bean Transp., Inc. v. Hill, 2009 Ark. App. 760, 348 S.W.3d 56 (2009); CNA Ins. Co. v. Ark. Children's Hosp., 2011 Ark. App. 671, — S.W.3d — (2011); St. Joseph's Mercy Med. Ctr. v. Redmond, 2012 Ark. App. 7, — S.W.3d — (2012).

11-9-705. Nature of proceedings generally.

(a) CONDUCT OF HEARING OR INQUIRY.

(1) In making an investigation or inquiry or conducting a hearing, the Workers' Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner as will best ascertain the rights of the parties.

(2) Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made, or the hearing conducted, may be received in evidence and may, if corroborated by other evidence, be sufficient to establish the injury.

(3) When deciding any issue, administrative law judges and the commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of evidence.

(b) HEARINGS TO BE PUBLIC — RECORDS.

(1)(A) Hearings before the commission shall be open to the public and shall be stenographically reported, and the commission is authorized to contract for the reporting of the hearings.

(B) The commission shall, by rule or regulation, provide for the preparation of a record of all hearings and other proceedings before it.

(2) However, the commission shall not be required to stenographically report or prepare a record of joint petition hearings. Instead, the administrative law judge or legal advisor shall tape the hearing at no cost to the parties.

(c) INTRODUCTION OF EVIDENCE.

(1)(A) All oral evidence or documentary evidence shall be presented to the designated representative of the commission at the initial hearing on a controverted claim, which evidence shall be stenographically reported.

(B) Each party shall present all evidence at the initial hearing.

(C)(i) Further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or commission.

(ii) A request for a hearing for the introduction of additional evidence must show the substance of the evidence desired to be presented.

(2)(A) Any party proposing to introduce medical reports or testimony of physicians at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the commission copies of the written reports of the physicians of their findings and opinions at least seven (7) days prior to the date of the hearing. However, if no written reports are available to a party, then the party shall, in lieu of furnishing the report, notify in writing the opposing party and the commission of the name and address of the physicians proposed to be used as witnesses at least seven (7) days prior to the hearing and the substance of their anticipated testimony.

(B) If the opposing party desires to cross-examine the physician, he or she should notify the party who submits a medical report to him or her as soon as practicable, in order that he or she may make every effort to have the physician present for the hearing.

(3) A party failing to observe the requirements of this subsection may not be allowed to introduce medical reports or testimony of physicians at a hearing, except in the discretion of the hearing officer or the commission.

(4) The time periods may be waived by the consent of the parties.

(d) Expert testimony shall not be allowed unless it satisfies the requirements of Federal Rule of Evidence 702 with annotations and amendments, that is, *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

History. Init. Meas. 1948, No. 4, § 27, Acts 1949, p. 1420; Acts 1981, No. 290, § 11; A.S.A. 1947, § 81-1327; Acts 1993, No. 796, § 30; 2001, No. 1281, § 4.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act,

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General Assembly, Labor Law, 24 U. Ark. Little Rock L. Rev. 493.

Ark. L. Rev. Rules of Evidence in Ad-

ministrative Proceedings, 15 Ark. L. Rev. 138.

Watkins, Open Meetings Under the Arkansas Freedom of Information Act, 38 Ark. L. Rev. 268.

CASE NOTES

ANALYSIS

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Appeal.

The Workers' Compensation Commission is vested with discretion in determining whether and under what circumstances a case appealed to them should be remanded for the taking of additional evidence; on appeal an exercise of that discretion will not be lightly disturbed. A case should only be remanded if the new discovered evidence is relevant, is not merely cumulative, would change the result, and was diligently discovered and produced by the movant. *Roberts-McNutt, Inc. v. Williams*, 15 Ark. App. 240, 691 S.W.2d 887 (1985), *aff'd*, 288 Ark. 587, 708 S.W.2d 87 (Ark. 1986).

Continuance.

Workers' Compensation Commission acted within its discretion in affirming the

administrative law judge's (ALJ) denial of the claimant's motion for a continuance because the claimant failed to present evidence to demonstrate his assertion that claimants had an absolute right to obtain a dismissal without prejudice, notwithstanding the language in the ALJ's prehearing order stating that the hearing schedules would be changed only for good cause. The ALJ allowed the claimant additional time to take his treating physician's deposition and it was entered into the record; the proffered testimony from the only missing witnesses at the hearing was deemed as having no bearing on the facts that would determine compensability. *Long v. Wal-Mart Stores*, 98 Ark. App. 70, 250 S.W.3d 263 (2007), review denied, *Long v. Wal-Mart Stores, Inc.*, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 428 (May 3, 2007).

Discretion of Commission.

It is a discretionary matter for the commission as to whether it will hear oral arguments or allow the presentation of any additional evidence. *Bartlett v. Mead Containerboard*, 47 Ark. App. 181, 888 S.W.2d 314 (1994).

Duty of Court.

The Workers' Compensation Commission is not an appellate court, but the factfinder, and its duty and statutory obligation is to make specific findings of fact, on de novo review based on the record as a whole, and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992).

Plain language of §§ 11-9-511(a) and 11-9-811 did not authorize the Arkansas Workers' Compensation Commission (Commission) to, sua sponte, order an independent medical examination (IME) after the parties had litigated compensability and additional benefits; these statutes did not give the Commission authority to reserve making determinations on compensability and additional benefits when those were the only issues litigated by the parties, and the Commission did not err in finding that the administrative law judge exceeded his authority when he ordered an IME. *Burkett v. Exxon Tiger Mart, Inc.*, 2009 Ark. App. 93, 304 S.W.3d 2 (2009).

Evidence.

Where the employee sought workers' compensation benefits for a left-knee injury, the decision to admit a belated MRI report was entirely within the ALJ's discretion, and he did not abuse that discretion under subdivision (c)(3) of this section. The employee had a good reason for waiting until after the first hearing to undergo an MRI; the employee could not afford it until then. *The Steak House v. Weigel*, 101 Ark. App. 81, 270 S.W.3d 365 (2007).

Arkansas Workers' Compensation Commission erred in holding that an employee was entitled to implantation of a dorsal-column stimulator if additional testing and examination showed it to be necessary because the finding that another evaluation needed to occur was a tacit admission that the record did not contain evidence sufficient under subdivision (c)(1) of this section to rule outright that additional treatment was reasonable and necessary. *Sea Ark Marine, Inc. v. Pipingier*, 2009 Ark. App. 223, 303 S.W.3d 102 (2009).

Workers' compensation claimant failed to prove by a preponderance of the evidence that the claimant was entitled to additional medical treatment in the form of surgery recommended by a different doctor after the claimant's doctor opined that the claimant had reached maximum medical improvement and would not benefit from surgery. *Crawford v. Superior Indus. & Crockett Adjustment, Inc.*, 2009 Ark. App. 738, — S.W.3d — (2009).

When the employee suffered a compensable neck injury, physical therapy was

unsuccessful and two doctors recommended injection therapy as a reasonable treatment alternative. The Arkansas Workers' Compensation Commission erred by refusing to require the employer to provide additional medical care under subdivision (a)(3) of this section. *Foster v. Kann Enters.*, 2009 Ark. App. 746, 350 S.W.3d 796 (2009).

Appellate court was required to defer to the Workers' Compensation Commission's determination that one doctor's opinion that an employee had reached maximum medical improvement for a compensable neck injury was entitled to greater weight than the opinions of other doctors, who opined that the employee needed lower back surgery. *Believ v. Lennox Indus.*, 2010 Ark. App. 112, — S.W.3d — (2010), rehearing denied, — Ark. App. —, — S.W.3d —, 2010 Ark. App. LEXIS 265 (Mar. 17, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 363 (June 24, 2010).

Arkansas Workers' Compensation Commission did not abuse its discretion by refusing to admit into evidence a form an employer's human resources administrator completed at a doctor's request or certain photographs because the employer deposed both the employee and doctor well in advance of the hearing, and the proffered medical document did not rebut the doctor's testimony since there was nothing in the record to indicate that he was aware of the document; the photographs were available and discussed at the employee's deposition. *Mack-Reynolds Appraisal Co. v. Morton*, 2010 Ark. App. 142, — S.W.3d — (2010).

Arkansas Workers' Compensation Commission did not abuse its discretion in denying a motion to remand a case to the administrative law judge (ALJ) based upon alleged new medical findings where the employer and the insurer were not diligent in exploring the possibility of other causes for the claimant's headaches until after the ALJ had awarded benefits. *Wayne Smith Trucking, Inc. v. McWilliams*, 2011 Ark. App. 414, — S.W.3d — (2011).

Finding that an employee in a workers' compensation action was not entitled to medical treatment from a doctor in connection with the employee's compensable back injury was appropriate under § 11-9-508(a) and subdivision (a)(3) of this sec-

tion because the doctor's statement that the injuries "could" have been caused by her accident at work was insufficient under § 11-9-102(16)(B). *Hawley v. First Sec. Bancorp*, 2011 Ark. App. 538, — S.W.3d — (2011).

Substantial evidence supported the Arkansas Workers' Compensation Commission's decision that a claimant was not entitled to additional medical treatment under § 11-9-508(a) because the claimant's medical records indicated her complaints were inconsistent with and in excess of the clinical, objective findings and there was credible testimony the claimant was malingering; thus, the claimant failed to prove that additional medical treatment was reasonably necessary, in accordance with subdivision (a)(3) of this section. *Briseno v. George's, Inc.*, — Ark. App. —, — S.W.3d —, 2011 Ark. App. LEXIS 544 (Sept. 7, 2011).

Substantial evidence supported the Arkansas Workers' Compensation Commission's decision that a claimant's relationship with a contractor was that of an independent contractor because that was the relationship both parties agreed to before the work began and, as such, the contractor was not liable for the claimant's injuries, pursuant to § 11-9-402(c)(1)(A); the claimant acknowledged his intent in the beginning of the work relationship with the contractor was that no taxes would be withheld from his pay and the claimant would not be covered by workers' compensation insurance. *Woodmancy v. Framco, Inc.*, 2011 Ark. App. 785, — S.W.3d — (2011).

Arkansas Workers' Compensation Commission did not err in denying the admission of evidence appellants proffered because its determination that appellants were not diligent was not an abuse of discretion; appellants had ample opportunity to offer proof to support their case at the initial hearing before the administrative law judge, but the evidence was not proffered until the case was remanded on appeal. *St. Joseph's Mercy Med. Ctr. v. Redmond*, 2012 Ark. App. 7, — S.W.3d — (2012).

Where an employee contended that he was in excruciating pain, the Workers' Compensation Commission's allowance of photographs showing the employee drinking and partying did not constitute an abuse of the Commission's discretion un-

der subsection (a) of this section because the pictures could have had a bearing on the employee's credibility. *Clement v. Johnson's Warehouse Showroom, Inc.*, 2012 Ark. App. 17, — S.W.3d — (2012).

—In General.

Decedent's testimony held sufficiently corroborated to allow claim. *Garrison Furn. Co. v. Butler*, 206 Ark. 702, 177 S.W.2d 738 (1944); *American Can Co. v. Pettyjohn*, 258 Ark. 98, 522 S.W.2d 358 (1975).

Claimant was entitled to have facts submitted to commission on any provision of law which would justify award in his favor. *Triebisch v. Athletic Mining & Smelting Co.*, 218 Ark. 379, 237 S.W.2d 26 (1951).

Whether there is substantial evidence to support the findings of the Workers' Compensation Commission is a matter of law. *Boyd Excelsior Fuel Co. v. McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956).

On an appeal to the full commission presented solely on the transcript of the record made before the referee, it is the duty of the commission to make a finding according to the preponderance of the evidence, and not merely whether there is substantial evidence to support the finding of the referee, and the commission may pass upon the credibility of the witnesses. *Moss v. El Dorado Drilling Co.*, 237 Ark. 80, 371 S.W.2d 528 (1963); *Potlatch Forests, Inc. v. Smith*, 237 Ark. 468, 374 S.W.2d 166 (1964); *Arkansas Coal Co. v. Steele*, 237 Ark. 727, 375 S.W.2d 673 (1964).

Commission has broad discretion with reference to admission of evidence. *Potlatch Forests, Inc. v. Funk*, 239 Ark. 330, 389 S.W.2d 237 (1965).

The commission is not bound by strict rules of evidence in the admission or consideration of any evidence, including medical testimony; it has broad discretion with reference to admission of evidence, and it is free to make such inquiry and to conduct the proceedings in such a manner as to best ascertain the rights of the parties. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979).

While the commission is not bound by technical rules of evidence or procedure, the fact-finders are expected to adhere to basic rules of fair play, such as recognizing the right of cross-examination and the

necessity of having all the evidence in the record. *Brewer v. Tyson Foods, Inc.*, 10 Ark. App. 88, 661 S.W.2d 423 (1983).

Where at second hearing the judge considered two documents that had not previously been introduced into evidence and did not notify the parties until after the final hearing that he intended to make the documents a part of the record, the claimant was effectively denied a hearing concerning the documents admitted and considered by the judge and was thereby precluded from cross-examining the individuals who completed the two exhibits; consequently, decision denying benefits must be reversed and remanded. *Brewer v. Tyson Foods, Inc.*, 10 Ark. App. 88, 661 S.W.2d 423 (1983).

The commission erred where it based its decision on a finding of fact which was clearly not in issue or developed by the evidence without notice to the parties of its intent to do so and where no opportunity to offer proof on that issue was afforded. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

The Workers' Compensation Commission has broad discretion with reference to admission of evidence and its decision will not be reversed absent a showing of abuse of that discretion. *Southwest Pipe & Supply v. Hoover*, 13 Ark. App. 144, 680 S.W.2d 723 (1984).

Under subsection (c) of this section, the judge has discretion to order further hearings for the purpose of introducing additional evidence, even though this section directs that each party must present all evidence at the initial hearing; thus, if an administrative law judge can order additional evidentiary hearings, a fortiori, the judge necessarily should have the power and discretion to reserve his or her decision on a related issue which might be affected by any additional evidence. *Wooten v. Arkansas Aluminum Window & Door, Inc.*, 17 Ark. App. 209, 706 S.W.2d 198 (1986).

Employer should have been permitted to present evidence that the employee's injuries were caused when he fell from the roof of his home. *Whirlpool Corp. v. Kaelin*, 19 Ark. App. 331, 720 S.W.2d 722 (1986).

Workers' Compensation Commission was given a great deal of latitude in evidentiary matters; commission was not bound by technical or statutory rules of

evidence or by technical or formal rules of procedure. *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001).

—Additional Evidence.

Subdivision (c)(1) specifically contemplates that while all evidence is to be offered at the initial hearing, the commission and the administrative law judge have the discretionary power to permit the introduction of additional evidence. *Grimes v. North Am. Foundry*, 316 Ark. 395, 872 S.W.2d 59 (Ark. 1994).

Substantial evidence supported Workers' Compensation Commission's finding that claimant acted diligently in obtaining the additional medical evidence and that claimant sustained a compensable injury; the December 2001 MRI report and the February 2002 operative report, both introduced at the second hearing, constituted sufficient evidence to uphold the findings. *Hargis Transp. v. Chesser*, 87 Ark. App. 301, 190 S.W.3d 309 (2004).

Workers' Compensation Commission was correct in refusing to allow the claimant to present new evidence contained in six depositions because the claimant failed to demonstrate the evidence's relevancy; the evidence in the depositions related solely to the claimant's vague constitutional arguments that had no bearing on whether his injury was compensable and the evidence did not suggest that political pressure caused the administrative law judge to treat the claimant's case unfairly. The claimant also failed to demonstrate that the evidence he sought to introduce would have produced a different result. *Long v. Wal-Mart Stores*, 98 Ark. App. 70, 250 S.W.3d 263 (2007), review denied, *Long v. Wal-Mart Stores, Inc.*, — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 428 (May 3, 2007).

—Blood Tests.

The Workers' Compensation Commission was not bound by technical rules of evidence or procedure; however a sufficient foundation for the admission of a blood-alcohol test was laid and thus was admissible. *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980).

Where only persons who had any part in a blood-alcohol test introduced into evidence in a workers' compensation hearing, all testified and were cross-examined, and the machine used in the test had been

approved by the Department of Health and was constantly kept in proper calibration by the lab, there was a sufficient degree of compliance with §§ 5-65-201 — 5-65-205 and the Department of Health's rules so that the test results were admissible. *St. Paul Ins. Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980).

—Burden of Proof.

Burden of proof is upon claimant to show that injury or death was the result of an accident incurred in and growing out of the course of employment. *Pearson v. Faulkner Radio Serv. Co.*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Lybrand v. Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979).

The evidence is to be weighed impartially, without giving the benefit of the doubt to any party. *Gencorp Polymer Prods. v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (1991).

—Decedent's Declarations.

Where testimony of witness was not about a deceased employee's statement concerning an injury, but about statements of a deceased employee concerning her relationship with a former coworker who murdered the decedent, subdivision (a)(2) did not apply. *Kendrick v. Peel, Eddy & Gibbons Law Firm*, 32 Ark. App. 29, 795 S.W.2d 365 (1990).

—Medical.

An employee must object to the failure to verify a doctor's report on the cause of disability when the case is before the commission so that it can be verified and the doctor cross-examined. *Foster v. Fort Smith Cotton Oil Co.*, 224 Ark. 394, 273 S.W.2d 529 (1954).

A doctor's report even though properly verified is only entitled to such weight as may be warranted from all the evidence in the case. *Boyd Excelsior Fuel Co. v. McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956).

Doctor's reports which were not verified as required by statute but to which no objections were made and no opportunity for cross-examination afforded were only entitled to such weight as was warranted from all the facts of the case. *Boyd Excelsior Fuel Co. v. McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956).

Commission erred in holding that employee's healing period terminated several months prior to date of physician's testi-

mony in light of physician's testimony to the contrary. *Hamilton v. Kelley-Nelson Constr. Co.*, 228 Ark. 612, 309 S.W.2d 323 (1958).

It was proper for expert medical witnesses to give their opinion on basis of information contained in autopsy report and hospital record. *Holstein v. Quality Excelsior Coal Co.*, 230 Ark. 758, 324 S.W.2d 529 (1959).

Where pivotal question of fact as to the exact cause of medical condition could not be resolved by any witness with complete certainty, conflicts in proof had a bearing on the testimony of each witness but did not have effect of depriving testimony of all substantiality. *Holstein v. Quality Excelsior Coal Co.*, 230 Ark. 758, 324 S.W.2d 529 (1959).

Since autopsy reports and clinical histories are statements of fact rather than expressions of an opinion, they are admissible. *Rhea v. M-K Grocer Co.*, 236 Ark. 615, 370 S.W.2d 33 (1963).

Commission did not err in admitting letter of physician expressing medical opinion where physician subsequently testified and was available for cross-examination. *Potlatch Forests, Inc. v. Funk*, 239 Ark. 330, 389 S.W.2d 237 (1965).

When the commission reopened the case for a further hearing at which time a doctor testified, who had reexamined the claimant by order of the commission, it was error for the commission to refuse claimant's motion that he be allowed to call two doctors in rebuttal to the testimony of the commission's doctor. *Davis v. Arkansas Best Freight Sys.*, 239 Ark. 632, 393 S.W.2d 237, 17 A.L.R.3d 986 (1965).

The refusal to allow claimant's attorney to impeach a doctor's testimony by the introduction of a letter written by the witness in another case and only allowing the last sentence of the letter to be introduced was error; to get the full effect of the attempted impeachment the entire letter should have been allowed to be introduced. *Davis v. Arkansas Best Freight Sys.*, 239 Ark. 632, 393 S.W.2d 237, 17 A.L.R.3d 986 (1965).

While technical rules of evidence do not apply to workers' compensation procedures, a litigant has the right to cross-examine a witness and thus it is error for the commission to allow a doctor to read from medical textbooks and writings. *Davis v. Arkansas Best Freight Sys.*, 239 Ark.

632, 393 S.W.2d 237, 17 A.L.R.3d 986 (1965).

The commission has broad discretion with reference to the admission of evidence, and it was not an abuse of discretion for the commission to permit appellants to cross-examine medical witness subsequent to the close of the hearing, nor did appellants waive their right to cross-examine. *Northwestern Nat'l Ins. Co. v. Weast*, 253 Ark. 710, 488 S.W.2d 322 (1972).

Inasmuch as the commission was not bound by Civil Rules of Evidence in its admission and consideration of evidence, the commission was within its discretion in hearing the testimony of a doctor on the issue of whether an employee's fatal heart attack was the result of his employment, despite the fact that the testimony was in conflict with the opinions of more celebrated experts. *Barksdale Lumber Co. v. McAnally*, 262 Ark. 379, 557 S.W.2d 868 (1977).

Although the commission's knowledge and experience is not evidence, once it has before it firm medical evidence of physical impairment and functional limitation it has the advantage of its own superior knowledge of industrial demands, limitations and requirements and can apply its knowledge and expertise in weighing the medical evidence of functional limitations together with other evidence of the manner in which the functional disability will affect the ability of an injured employee to obtain or hold a job and thereby arrive at reasonably accurate conclusions as to the extent of injury. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984).

—Stipulations.

The commission did not err in allowing the employer to raise the issue of compensability after the compensability of his claim had been stipulated by the parties. *Jackson v. Circle T Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995).

—Sufficiency.

Evidence held sufficient to support commission's findings. *Garrison Furn. Co. v. Butler*, 206 Ark. 702, 177 S.W.2d 738 (1944); *Johnson v. Little Rock Furn. Mfg. Co.*, 206 Ark. 1016, 178 S.W.2d 249 (1944); *Kloss v. Ford, Bacon & Davis*, 207 Ark. 115, 179 S.W.2d 172 (1944); *Fordyce Lum-*

ber Co. v. Shelton, 206 Ark. 1134, 179 S.W.2d 464 (1944) (preceding cases decided under prior law); *Frank Lyon Co. v. Scott*, 215 Ark. 274, 220 S.W.2d 128 (1949); *Foster v. Fort Smith Cotton Oil Co.*, 224 Ark. 394, 273 S.W.2d 529 (1954); *Grimsley v. Manufacturers Furn. Co.*, 224 Ark. 769, 276 S.W.2d 64 (1955); *McFall v. Farmers Tractor & Truck Co.*, 227 Ark. 985, 302 S.W.2d 801 (1957); *Pruitt v. Moon*, 230 Ark. 986, 328 S.W.2d 71 (1959); *Burnett v. St. Mary's Hosp.*, 255 Ark. 1023, 505 S.W.2d 24 (1974).

Evidence held insufficient to support commission's findings. *Tri-States Constr. Co. v. Worthen*, 224 Ark. 418, 274 S.W.2d 352 (1955); *Eddington v. City Elec. Co.*, 237 Ark. 804, 376 S.W.2d 550 (1964); *Fireman's Fund Ins. Co. v. Hill*, 255 Ark. 73, 498 S.W.2d 865 (1973).

Fact Question.

Where the medical testimony was conflicting on whether claimant was either permanently partially or totally disabled or currently totally disabled, the resolution of such a conflict was a question of fact for the commission. *City of Humphrey v. Woodward*, 4 Ark. App. 64, 628 S.W.2d 574 (1982).

Jurisdiction.

Action to reform workers' compensation insurance policy was properly brought in chancery court rather than before Workers' Compensation Commission. *American Cas. Co. v. Hambleton*, 233 Ark. 942, 349 S.W.2d 664 (1961).

Notice.

Where reasonable notice was not given as required by commission's own rules, order of commission dismissing claim for want of prosecution was void. *Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969).

Reopening Case.

Absent a showing that the Workers' Compensation Commission acted arbitrarily and capriciously, or abused its discretion, a determination made by the commission not to reopen a case will not be disturbed. *Walker v. J & J Pest Control*, 6 Ark. App. 171, 639 S.W.2d 748 (1982).

Courts must adhere to legislative decision to adopt rigid rule that absent a showing of total disability a scheduled injury cannot be apportioned to the body

as a whole; accordingly, commission did not err in refusing to reopen record to receive additional evidence concerning degree to which injury caused disability to body as a whole. *Hill v. White-Rodgers*, 10 Ark. App. 402, 665 S.W.2d 292 (1984).

Workers' Compensation Commission did not abuse its discretion in denying a claimant's motion to reopen a claim for permanent total disability for carpal tunnel injuries on proffered evidence that the claimant sustained a degree of permanent impairment to both hands that was less than 100-percent impairment. *Kirkendolph v. DF&A Revenue Servs. Div.*, 2009 Ark. App. 629, — S.W.3d — (2009).

Unresolved Issues.

The issue of permanent disability compensation for decreased visual acuity caused by an irregular corneal astigmatism was properly reserved where the employee's physician had not yet determined the degree of correctable impairment. *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998).

Cited: *Shipp v. Tanner Estate*, 229 Ark. 815, 318 S.W.2d 821 (1958); *Mason v. Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960); *Ward Furn. Mfg. Co. v. Reather*, 234 Ark. 151, 350 S.W.2d 691 (1961);

Clemons v. Bearden Lumber Co., 240 Ark. 571, 401 S.W.2d 16 (1966); *Dura Craft Boats, Inc. v. Daugherty*, 247 Ark. 125, 444 S.W.2d 562 (1969); *Tri State Ins. Co. v. Employers Mut. Liab. Ins. Co.*, 254 Ark. 944, 497 S.W.2d 39 (1973); *Sneed v. Colson Corp.*, 254 Ark. 1048, 497 S.W.2d 673 (1973); *Ethridge v. Alexander Brown & Associates*, 258 Ark. 444, 527 S.W.2d 591 (1975); *Home Ins. Co. v. Meeker*, 9 Ark. App. 201, 657 S.W.2d 215 (1983); *Nicholas v. Hempstead County Mem. Hosp.*, 9 Ark. App. 261, 658 S.W.2d 408 (1983); *Odom v. Tosco Corp.*, 12 Ark. App. 196, 672 S.W.2d 915 (1984); *Kifer v. Liberty Mut. Ins. Co.*, 777 F.2d 1325 (8th Cir. 1985); *State, Second Injury Fund v. Mid-State Constr. Co.*, 16 Ark. App. 169, 698 S.W.2d 804 (1985); *Tracor/MBA v. Flowers*, 41 Ark. App. 186, 850 S.W.2d 30 (1993); *American Can Co. v. Pettyjohn*, 258 Ark. 98, 522 S.W.2d 358 (1975); *Priest v. UPS*, 58 Ark. App. 282, 950 S.W.2d 476 (1997); *Ester v. National Home Ctrs., Inc.*, 61 Ark. App. 91, 967 S.W.2d 565 (1998); *Cyphers v. UPS*, 68 Ark. App. 62, 3 S.W.3d 698 (1999); *Excelsior Hotel v. Squires*, 83 Ark. App. 26, 115 S.W.3d 823 (2003); *Maulding v. Price's Util. Contrs., Inc.*, 2009 Ark. App. 776, 358 S.W.3d 915 (2009).

11-9-706. Conduct of proceedings — Contempt.

(a) The Workers' Compensation Commission shall have the power to preserve and enforce order during any proceeding had before it, to issue subpoenas for and administer oaths to and compel the attendance and testimony of witnesses, and require the production of books, papers, documents, and other evidence.

(b) If any person or party in proceedings before the commission disobeys or resists any lawful order or process, or misbehaves during a hearing, or so near the place thereof so as to obstruct the hearing or neglects to produce, after having been ordered to do so, any book, paper, or document, or refuses to appear after having been subpoenaed, or upon appearing refuses to take oath as a witness, or after having taken the oath refuses to be examined according to law, or refuses to comply with any final order of an administrative law judge or the commission, or willfully refuses to pay an uncontroverted medical or related expense within forty-five (45) days after the respondent has received the statement, then the person or party, at the discretion of the administrative law judge or the commission, may be found to be in contempt of the commission and may be subject to a fine not to exceed ten thousand dollars (\$10,000).

History. Init. Meas. 1948, No. 4, § 31, Acts 1949, p. 1420; A.S.A. 1947, § 81-1331; Acts 1995, No. 1230, § 1.

CASE NOTES

ANALYSIS

In General.
Applicability.
Production of Evidence.

In General.

Where the attorney has appealed to the circuit court from the commission's ruling on his fee, this statute authorizing contempt proceedings by the commission may not be invoked. *Robinson v. Keaton*, 239 Ark. 600, 393 S.W.2d 231 (1965).

Employer did not violate previous orders of the Arkansas Workers' Compensation Commission when it failed to pay for surgery recommended by a different doctor because the employer was entitled to challenge the reasonableness of the new treatment and substantial evidence supported the Commission's determination that the suggested surgery was not reasonable and necessary. *Crawford v. Superior Indus. & Crockett Adjustment, Inc.*, 2009 Ark. App. 738, — S.W.3d — (2009).

Applicability.

Dismissal of plaintiff's claim was not same as holding him, or his attorney, in contempt, so requirements of this section did not apply. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988).

Production of Evidence.

Where claim was controverted, discovery started by the parties before the claim was set for hearing was authorized by the Workers' Compensation Commission's Rule 16, and this rule authorized the law judge to make proper orders pertaining to that discovery, including dismissal of the action for failure to comply with discovery orders. *Loosey v. Osmose Wood Preserving Co.*, 23 Ark. App. 137, 744 S.W.2d 402 (1988).

Cited: *Johnson v. American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992); *Priest v. UPS*, 58 Ark. App. 282, 950 S.W.2d 476 (1997); *Cyphers v. UPS*, 68 Ark. App. 62, 3 S.W.3d 698 (1999).

11-9-707. Presumptions.

In any proceeding for the enforcement of a claim for compensation, the following prima facie presumptions shall exist:

- (1) That the Workers' Compensation Commission has jurisdiction;
- (2) That sufficient notice was given; and
- (3) That the injury was not occasioned by the willful intention of the injured employee to bring about the injury of himself or herself or another.

History. Init. Meas. 1948, No. 4, § 24, Acts 1949, p. 1420; A.S.A. 1947, § 81-1324; Acts 1993, No. 796, § 3.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of

2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

ANALYSIS

Construction.
Applicability.

Evidence.
Intoxication.
Jurisdiction.
Question of Fact a Law.

Suicide.

Construction.

In determining whether a disputed claim under the former Workers' Compensation Law should be allowed, the terms of that law were given a liberal interpretation in favor of the claimant. *Batesville White Lime Co. v. Bell*, 212 Ark. 23, 205 S.W.2d 31 (1947) (decision under prior law).

Applicability.

The provisions contained in former Workers' Compensation Law that there was presumption that a claim came within the provisions of that law was omitted by current Workers' Compensation Law and there now is no such presumption. *John Bishop Constr. Co. v. Orlicek*, 224 Ark. 182, 272 S.W.2d 820 (1954).

Evidence.

Evidence sufficient to support finding by the commission that injuries which caused employee's death were sustained in the course of his employment and to justify compensation award in view of presumption created by this section. *Garrison Furn. Co. v. Butler*, 206 Ark. 702, 177 S.W.2d 738 (1944) (decision under prior law).

Workers' Compensation Commission's finding that employer was not estopped to assert the defense of intoxication was supported by substantial evidence. *Blevins v. Safeway Stores*, 25 Ark. App. 297, 757 S.W.2d 569 (1988).

Intoxication.

In compensation proceeding, the burden was on the employer to show that employee's death resulted solely from his intoxicated condition. *Elm Springs Canning Co. v. Sullins*, 207 Ark. 257, 180 S.W.2d 113 (1944); *Cox Bros. Lumber Co. v. Jones*, 220 Ark. 431, 248 S.W.2d 91 (1952) (preceding cases decided under prior law).

Employer held liable for compensation as result of watchman being hit by train even though watchman had been drinking, if reason for watchman being hit by train was entirely speculative. *Cox Bros. Lumber Co. v. Jones*, 220 Ark. 431, 248 S.W.2d 91 (1952) (decision under prior law).

Presumption against intoxication as cause of injury was overcome where there was testimony as to the deceased's blood-

alcohol level and no proof of another cause of the automobile accident. *Goza v. Central Ark. Dev. Council, Inc.*, 254 Ark. 694, 496 S.W.2d 388 (1973).

Prior to 1993, there was a prima facie presumption under former subdivision (4) of this section that an injury did not result from intoxication of the injured employee while on duty; now however, under § 11-9-102(5)(B)(iv) (now § 11-9-102(4)), the presence of an intoxicant creates a rebuttable presumption that the injury or accident was substantially occasioned by the use of the intoxicant. *Weaver v. Whitaker Furn. Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996).

Until 1993, a prima facie presumption existed that an injury did not result from intoxication of the injured employee while on duty; Acts 1993, No. 796 changed that presumption by deleting former subdivision (4) of this section and amending § 11-9-102(5)(B)(iv) (now § 11-9-102(4)). *Brown v. Alabama Elec. Co.*, 60 Ark. App. 138, 959 S.W.2d 753 (1998), review denied, 334 Ark. 35, 970 S.W.2d 807 (1998).

Jurisdiction.

Jurisdiction of the commission over the employer also gave it jurisdiction over the insurance carrier. *Southern Farm Bureau Cas. Ins. Co. v. Tuggle*, 270 Ark. 106, 603 S.W.2d 452 (1980).

The Workers' Compensation Commission had jurisdiction to decide whether there was a workers' compensation policy in force at the time of the injury of farmworker and whether such worker was an employee. *Southern Farm Bureau Cas. Ins. Co. v. Tuggle*, 270 Ark. 106, 603 S.W.2d 452 (1980).

Where employee asserted a cause of action in circuit court based in part on this chapter and in part on the Arkansas Civil Rights Act, § 16-123-101 et seq., the circuit court did not lack subject-matter jurisdiction. *Malone v. Trans-States Lines*, 325 Ark. 383, 926 S.W.2d 659 (1996).

Evidence held sufficient to rebut the statutory presumption of jurisdiction where (1) the claimant truck driver testified that she resided in Alabama, that she was hired in Georgia, and that her employer was located in Texas, and (2) the employer stipulated that it did not have an office or employees in Arkansas and the claimant did not disagree with that stipulation. *Baker v. Frozen Food Express*

Transp., 63 Ark. App. 100, 974 S.W.2d 487 (1998), substituted opinion, 981 S.W.2d 101 (Ark. Ct. App. 1998).

The presumption of jurisdiction was rebutted where the injured truck driver's sole connection with Arkansas was that the accident occurred in Arkansas and the employer's sole connections were the existence of a designated fuel stop and an unsupervised drop yard in Arkansas; the employment relationship was entered into in Georgia, the driver was paid from Texas, the driver carried out her duties throughout the United States and Canada, and she was a resident of Alabama. *Baker v. Frozen Food Express Transp.*, 336 Ark. 451, 987 S.W.2d 658 (1999).

Question of Fact a Law.

The statutory presumption that an injury is not occasioned by the willful intention of the employee in subsection (3) is a

rebuttable one, however the issue of whether it was overcome by the evidence is a question of fact for the Workers' Compensation Commission to determine. *Eagle Safe Corp. v. Egan*, 39 Ark. App. 79, 842 S.W.2d 438 (1992).

Suicide.

Where employee of sand and gravel plant was killed during working hours on company property and his body was found at a place where he might properly have been in the performance of acts which, though personal, were incidental to the employment, there was a prima facie presumption against suicide. *Williams v. Gifford-Hill & Co.*, 227 Ark. 340, 298 S.W.2d 323 (1957).

Cited: *Country Pride v. Holly*, 3 Ark. App. 216, 624 S.W.2d 443 (1981); *Baker v. Frozen Food Express Transp.*, 63 Ark. App. 100, 974 S.W.2d 487 (1998).

11-9-708. Depositions.

The Workers' Compensation Commission may cause depositions of witnesses to be taken in such manner as it may direct.

History. Init. Meas. 1948, No. 4, § 28, Acts 1949, p. 1420; A.S.A. 1947, § 81-1328.

11-9-709. Witness fees.

Each witness who appears in obedience to a subpoena shall be entitled to the same fees as witnesses in a civil action in the circuit court.

History. Init. Meas. 1948, No. 4, § 29, Acts 1949, p. 1420; A.S.A. 1947, § 81-1329.

11-9-710. Attorneys.

(a) Where the Workers' Compensation Commission is a party to or is otherwise interested in a court proceeding under this chapter, it may employ attorneys to appear in its behalf.

(b) If requested by the commission, it shall be the duty of the Attorney General or the prosecuting attorneys of the different circuits to represent the commission without extra compensation.

History. Init. Meas. 1948, No. 4, § 25, Acts 1949, p. 1420; A.S.A. 1947, § 81-1325.

CASE NOTES

ANALYSIS

Settlement.
Suit for Fees.

Settlement.

Where an insurance company carries on settlement negotiations with claimant, although it knows claimant is represented by attorneys and the settlement is made without the approval or knowledge of the attorneys, the commission should pass on the question of fraud in the settlement before the insurance company can rely on the statute of limitations. *Dixie Cup Co. v. O'Neal*, 240 Ark. 785, 402 S.W.2d 417 (1966).

Suit for Fees.

This section does not prevent an attorney from bringing suit for his fees in a workers' compensation case where the ter-

mination of the healing period of his client is reserved by the court to be decided at a later date. *Ragon v. Great Am. Indem. Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954).

Cited: *Cole v. Hendry Corp.*, 230 Ark. 100, 321 S.W.2d 377 (1959); *Herman Wilson Lumber Co. v. Hughes*, 245 Ark. 168, 431 S.W.2d 487 (1968); *Davis v. Stearns-Rogers Constr. Co.*, 248 Ark. 344, 451 S.W.2d 469 (1970); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Ozark Rustic Homes v. Albright*, 269 Ark. 696, 600 S.W.2d 420 (Ct. App. 1980); *Foust v. Ward Sch. Bus Mfg. Co.*, 271 Ark. 411, 609 S.W.2d 88 (1980); *Ashcraft v. Quimby*, 2 Ark. App. 174, 617 S.W.2d 390 (1981); *Travelers Ins. Co. v. Cole*, 3 Ark. App. 183, 623 S.W.2d 848 (1981); *State Second Injury Fund v. Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985); *Webb v. Workers' Comp. Comm'n*, 292 Ark. 349, 730 S.W.2d 222 (1987).

11-9-711. Finality of order or award — Review.

(a) AWARD OR ORDER OF ADMINISTRATIVE LAW JUDGE OR SINGLE COMMISSIONER — REVIEW.

(1) A compensation order or award of an administrative law judge or a single commissioner shall become final unless a party to the dispute shall, within thirty (30) days from the receipt by him or her of the order or award, petition in writing for a review by the full commission of the order or award.

(2) Any other party to the dispute may cross appeal by filing a written petition for cross appeal within fifteen (15) days after the notice of appeal is filed in the office of the Workers' Compensation Commission, except that in no event shall a cross appellant have less than thirty (30) days from the receipt by him or her of the order or award within which to file a notice of cross appeal.

(b) AWARD OR ORDER OF COMMISSION — APPEAL.

(1) A compensation order or award of the commission shall become final unless a party to the dispute shall, within thirty (30) days from receipt by him or her of the order or award, file notice of appeal to the Court of Appeals, which is designated as the forum for judicial review of those orders and awards.

(A) The appeal to the Court of Appeals may be taken by filing in the office of the commission, within thirty (30) days from the date of the receipt of the order or award of the commission, a notice of appeal, whereupon the commission under its certificate shall send to the Court of Appeals all pertinent documents and papers, together with a transcript of evidence and the findings and orders, which shall become the record of the cause.

(B) Any other party to the dispute may cross appeal by filing in the office of the commission a notice of cross appeal to the Court of Appeals within fifteen (15) days after the notice of appeal is filed, except that in no event shall a cross appellant have less than thirty (30) days from his or her receipt of the order or award of the commission within which to file a notice of cross appeal.

(C) The commission may assess and collect an appeal processing fee not to exceed fifteen dollars (\$15.00) from the appellant and, if cross appealed, the cross appellant.

(2) Appeals from the commission to the Court of Appeals shall be allowed as in other civil actions and shall take precedence over all other civil cases appealed to the Court of Appeals.

(3)(A) Upon appeal to the Court of Appeals, no additional evidence shall be heard.

(B) In the absence of fraud, the findings of fact made by the commission within its power shall be conclusive and binding upon the Court of Appeals and shall be given the same force and effect as in cases heretofore decided by the Supreme Court, except subject to review as in subdivision (b)(4) of this section.

(4) The Court of Appeals shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the order or award, upon any of the following grounds, and no other:

(A) That the commission acted without or in excess of its powers;

(B) That the order or award was procured by fraud;

(C) That the facts found by the commission do not support the order or award; or

(D) That the order or award was not supported by substantial evidence of record.

(c) APPEAL COSTS.

(1) In all appeals the cost shall be assessed as provided by law in civil cases.

(2) The commission may require a bond from either party, if it deems necessary, in cases appealed to the Court of Appeals.

(d) SCHOOL DISTRICT EMPLOYEES. The action taken by the commission with respect to the allowance or disallowance of any claim filed by a school district employee shall be subject to appeal to the Court of Appeals as provided for in subsection (b) of this section.

History. Init. Meas. 1948, No. 4, § 25, Acts 1949, p. 1420; Acts 1967, No. 501, § 1; 1975 (Extended Sess., 1976), No. 1227, § 15; 1979, No. 252, § 1; 1979, No. 253, § 7; 1979, No. 597, § 4; 1981, No. 290, § 14; 1981, No. 631, §§ 1, 2; A.S.A. 1947, §§ 81-1325, 81-1325.1; reen. Acts 1987, No. 1015, § 15; Acts 2001, No. 1757, § 7; 2003, No. 1473, § 24.

A.C.R.C. Notes. Part of this section was reenacted by Acts 1987, No. 1015, § 15. Acts 1987, No. 834 provided that

1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Acts 2001, No. 1757, § 12, provided: "All laws and parts of laws expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999."

Publisher's Notes. The Arkansas Court of Appeals held, in a Per Curiam opinion issued on March 28, 1990, that subsection (b) of this section was not superseded by ARAP 4.

RESEARCH REFERENCES

Ark. L. Rev. Mandamus to Review Administrative Action in Arkansas, 11 Ark. L. Rev. 352.

U. Ark. Little Rock L.J. Stafford, Separation of Powers and Arkansas Ad-

ministrative Agencies: Distinguishing Judicial Power and Legislative Power, 7 U. Ark. Little Rock L.J. 279.

Fifteenth Annual Survey of Arkansas Law, 15 U. Ark. Little Rock L.J. 427.

CASE NOTES

ANALYSIS

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Note. — Prior to the 1976 amendment, appeals from commission orders were made to the circuit court. The 1976 amendment provided for appeals directly to the Supreme Court. Since the 1979 amendments, appeals have been made to the Court of Appeals. These changes should be kept in mind with respect to the following notes.

Constitutionality.

Former provision for automatic affirmation of the award of the Workers' Compensation Commission upon failure of the circuit court to reverse, modify, or remand the award or to set it aside within 60 days was unconstitutional as a usurpation of a

judicial function by the legislature. *Sands v. Albert Pike Motor Hotel*, 245 Ark. 755, 434 S.W.2d 288 (1968) (decision prior to 1976 amendment).

Former provision allowing direct appeal of cases from the commission to the Supreme Court, was unconstitutional under Ark. Const., Art. 7, § 4 which provides that the Supreme Court shall have appellate jurisdiction only. *Ward School Bus Mfg., Inc. v. Fowler*, 261 Ark. 100, 547 S.W.2d 394 (1977) (decision prior to 1979 amendments).

By allowing the Workers' Compensation Commission to review the evidence or, if deemed advisable, hear the parties, their representatives, and witnesses, § 11-9-704(b)(6)(A) adequately protects a claimant's due process rights; thus, the commission does not err and violate a claimant's right to due process by substituting its own credibility determinations for that of the law judge. *Stiger v. State Line Tire Serv.*, 72 Ark. App. 250, 35 S.W.3d 335 (2000).

In General.

Cause of action of claimant under this chapter was purely statutory precluding right to insist upon any judicial review except that which the legislature saw fit to provide. *J.L. Williams & Sons v. Smith*, 205 Ark. 604, 170 S.W.2d 82 (1943).

This chapter limits the setting aside of an award of the Workers' Compensation Commission to four instances and also provides that there shall not be a trial de novo on appeal. *John Bishop Constr. Co. v. Orlice*, 224 Ark. 182, 272 S.W.2d 820 (1954).

The statute was intended to remain in force as an exception to the later and more

general enactment of the Rules of Appellate Procedure. *Rogers v. International Paper Co.*, 66 Ark. App. 34, 988 S.W.2d 23 (1999).

Construction.

The circuit court must abide by the rules set out by this section in the construction of this chapter. *Fort Smith Couch & Bedding Co. v. Jones*, 231 Ark. 790, 332 S.W.2d 817 (1960) (decision prior to 1976 amendment).

The Arkansas Supreme Court did not intend that subsection (b) be superseded by ARAP 4. *Sunbelt Couriers v. McCartney*, 31 Ark. App. 8, 786 S.W.2d 121, aff'd, 303 Ark. 522, 798 S.W.2d 92 (Ark. 1990).

Applicability.

An Arkansas resident who entered into an employment contract with a corporation maintaining an office in Arkansas having control over the employment which was not at any fixed location came under this chapter, even though his injury occurred in another state in which all of his employment was performed. *International Paper Co. v. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971).

Administrative Law Judge Order.

Where the finding of an administrative law judge is supported by substantial evidence, the rule is well settled that the Court of Appeals will affirm such a finding on appeal. *Saint Vincent Infirmary v. Carpenter*, 268 Ark. 951, 597 S.W.2d 126 (Ct. App. 1980).

The duty of the Workers' Compensation Commission is to make a finding in accordance with the preponderance of the evidence and not on whether there is any substantial evidence to support the findings of the administrative law judge. *Oller v. Champion Parts Rebuilders, Inc.*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

When a decision of the Workers' Compensation Commission is appealed to the Court of Appeals, no weight is given to the findings and conclusions of the administrative law judge. *Smart v. Biggs*, 26 Ark. App. 141, 760 S.W.2d 882 (1988).

Evidence.

The Workers' Compensation Commission has the duty of weighing medical evidence as it does any other evidence, and if the evidence is conflicting, the resolution of the conflict is a question of fact

for the Commission. *Beeson v. Landcoast*, 43 Ark. App. 132, 862 S.W.2d 846 (1993).

Failure to Appeal.

Right of appeal from final award is not lost by failure to appeal from temporary and provisional award. *Caddo Quicksilver Corp. v. Barber*, 204 Ark. 985, 166 S.W.2d 1 (1942).

The court without reservation could accept the evidence that a letter was properly addressed and stamped to the Workers' Compensation Commission and duplicate letters or copies of the original mailed to other parties; while this evidence of itself raised a presumption factually that the letter evincing a desire to appeal from award made by the referee was received, this presumption disappeared and was dissolved when the receipt of the letter was denied by the addressee, *Workers' Compensation Commission. Old Republic Ins. Co. v. Martin*, 229 Ark. 1065, 320 S.W.2d 266 (1959).

Employee who did not appeal from order of full commission could not maintain action for damages in separate proceeding at law arising from alleged civil conspiracy to defraud him by intentional submission of false and misleading medical reports by defendants as evidence in proceeding before Workers' Compensation Commission. *Ragsdale v. Watson*, 201 F. Supp. 495 (W.D. Ark. 1962).

Finality.

An order retaining jurisdiction for the purpose of determining the end of healing period and the extent of permanent disability was final for the purposes of review on a petition filed after the expiration of 30 days. *Luker v. Reynolds Metals Co.*, 244 Ark. 1088, 428 S.W.2d 45 (1968).

The commission order setting aside a judgment for the claimants and opening up the record for the taking of additional evidence, was not a final order which was appealable. *Cooper Indus. Prods. v. Meadows*, 269 Ark. 966, 601 S.W.2d 275 (1980).

This section does not state the award becomes final only after 30 days, but rather that it shall become final unless some action is taken by either or both parties to the dispute to prevent the order from becoming final. *Arkansas State Hwy. & Transp. Dep't v. Godwin*, 270 Ark. 743, 606 S.W.2d 127 (1980); *White v. Air Sys., Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990).

Opinion of administrative law judge, which was filed and from which no appeal was taken within the 30-day requirement, became a final order or award, and "amended opinion" filed two months later did not amend the first opinion. *Colson Co. v. Fields*, 20 Ark. App. 187, 726 S.W.2d 296 (1987).

An order of the Worker Compensation Commission is ordinarily reviewable only at the point where it awards or denies compensation. *Mid-State Constr. v. Sealy*, 26 Ark. App. 186, 761 S.W.2d 951 (1988); *TEC v. Falkner*, 38 Ark. App. 13, 827 S.W.2d 661 (1992).

Worker's Compensation Commission's jurisdictional finding was purely an incidental issue and was not appealable. *Mid-State Constr. v. Sealy*, 26 Ark. App. 186, 761 S.W.2d 951 (1988).

Court order remanding case for administrative law judge to determine claimant's appropriate wage rate and periods of temporary total disability, and to make an award in accordance with those determinations, is not a final order and is not appealable. *American Mut. Ins. Co. v. Argonaut Ins. Co.*, 801 S.W.2d 55 (1991).

In order for the court to review a decision of the Workers' Compensation Commission, the order from which the parties appeal must be final; thus, where a claim that is remanded to the law judge by the commission for the taking of additional evidence and one that does not award compensation for monetary benefits must be dismissed by the court for lack of a final order. *Humphrey v. Faulkner Nursing Ctr.*, 61 Ark. App. 48, 964 S.W.2d 224 (1998).

Worker's appeal from the Arkansas Workers' Compensation Commission was dismissed on jurisdictional grounds because the Commission had not yet entered a final order in the worker's case; although the Commission had rejected the worker's claim that she had suffered additional compensable injuries, it had not resolved her claims for additional medical treatment and for temporary total disability benefits in connection with the compensable injuries that she suffered to her left ankle and foot. *Erwin v. Riverside Furniture Corp.*, 97 Ark. App. 42, 244 S.W.3d 14 (2006).

—Modification of Order.

Due process of law dictates that an employee who has been denied benefits

should be afforded the same opportunity to have his claim reconsidered where he has discovered subsequently to the denial of benefits that his was a meritorious claim. *Walker v. J & J Pest Control*, 270 Ark. App. 941, 606 S.W.2d 597 (1980).

Although this chapter does not provide for rehearing or reconsideration procedures, the commission does have the authority under § 11-9-713 to modify a final award, but only upon a showing of a change in physical condition or proof of an assignment of an erroneous wage rate. *Cooper Indus. Prods. v. Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982).

Where an administrative law judge filed an opinion denying claimant additional benefits and claimant did not file a timely appeal from that order, a subsequent attempt by the administrative law judge to amend his original order and award benefits to the claimant based on a doctor's clarification of the claimant's disability was improper, because the order denying benefits became final when no appeal was sought within 30 days. *Cooper Indus. Prods. v. Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982).

The doctrine of *res judicata*, forbidding the reopening of matters once judicially determined by competent authority, applies to the decisions of the Workers' Compensation Commission; having once determined that the claimant only suffered a 55% permanent disability to the body as a whole, the commission cannot 12 years later say that the claimant was totally disabled at that earlier time. *Tuberville v. International Paper Co.*, 18 Ark. App. 210, 711 S.W.2d 840 (1986).

Interest.

Where award was not made until one and one half years after death, claimants could not request Supreme Court to allow interest from date of death because of the delay where no interest was allowed in award, the circuit court affirmed the award with interest from date of final award and no appeal was prosecuted on the question of interest. *Tinsman Mfg. Co. v. Sparks*, 211 Ark. 554, 201 S.W.2d 573 (1947) (decision under prior law).

A claim for what is believed the full amount of interest is not limited by this section, where a timely protest is made after claimants learn from insurer's tender of payment that the full amount of

interest was not being offered. *Clemons v. Bearden Lumber Co.*, 240 Ark. 571, 401 S.W.2d 16 (1966).

Judicial Review.

Where the Workers' Compensation Commission made no findings as to whether the claimant sustained a compensable injury, or when the healing period ended if there was a compensable injury, or whether she was disabled at the time of the hearing, and if so, what was the cause of disability, the Court of Appeals was unable to tell from the record upon what factual basis the claim was denied and whether the commission erred in its application of the law; therefore, reversal and remand was appropriate. *Wright v. American Transp.*, 18 Ark. App. 18, 709 S.W.2d 107 (1986).

In considering an appeal from a decision of the Workers' Compensation Commission on the sufficiency of the evidence, the Court of Appeals reviews the evidence and all reasonable inferences therefrom in the light most favorable to the commission's findings; and the court must uphold the commission's findings if there is any substantial evidence to support them, even if the preponderance of the evidence would indicate a different result. *Tahutini v. Tastybird Foods*, 18 Ark. App. 82, 711 S.W.2d 173 (1986); *Smart v. Biggs*, 26 Ark. App. 141, 760 S.W.2d 882 (1988); *Bates v. Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1992).

In order to reverse a decision of the Workers' Compensation Commission, the Court of Appeals must be convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the commission; the question is not whether the evidence would support findings contrary to those made by the commission, but whether the evidence supports the findings made by the commission. *Franklin Collier Farms v. Chapple*, 18 Ark. App. 200, 712 S.W.2d 334 (1986); *Public Employee Claims Div. v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992).

The findings of the Workers' Compensation Commission must be upheld unless there is no substantial evidence to support them. *Price v. Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993).

The appellate court will not reverse a decision of the Workers' Compensation

Commission unless convinced that fair-minded persons with the same facts before them could not have reached the conclusion arrived at by the Commission. *Price v. Little Rock Packaging Co.*, 42 Ark. App. 238, 856 S.W.2d 317 (1993).

When reviewing a decision of the Workers' Compensation Commission on appeal, the appellate court must view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if those findings are supported by substantial evidence. *Beeson v. Landcoast*, 43 Ark. App. 132, 862 S.W.2d 846 (1993).

On appellate review, the duty of the court is to review questions of law only. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

The substantial evidence test applicable for judicial review of a commission decision means that the commission should not be reversed unless it is clear that fair-minded persons could not have reached the same result if presented with the same facts; the substantial evidence standard of appellate review means that the appellate court must affirm the commission if fair-minded people could have reached the same result after reviewing the evidence in the light most favorable to the result that the commission reached. *Hubley v. Best Western-Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996), superseded by statute as stated in, *Service Chevrolet v. Atwood*, 61 Ark. App. 190, 966 S.W.2d 909 (1998). But see *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000).

Employer's delay in paying the filing fee for an appeal did not extend or delay the deadline for lodging the record with the appellate court as nothing in either § 11-9-711(b)(1)(C) or Ark. Workers' Comp. Comm'n R. 18 indicated that the Workers' Compensation Commission would not consider a notice of appeal to have been filed until the filing fee had been paid. *Waste Mgmt. v. Estridge*, 210 S.W.3d 869 (2005).

—Filing of Record.

The record on appeal from the Workers' Compensation Commission should be filed in the Court of Appeals within 90 days from the filing of the notice of appeal as is required in other civil actions. *Davis v. C*

& M Tractor Co., 2 Ark. App. 150, 617 S.W.2d 382 (1981).

Denial of employer's motion for rule on the clerk to accept an untimely record was affirmed as Ark. R. App. P. — Civ. 5 required the records to be filed within 90 days of the notice of appeal being filed and the employer tendered the record outside of the ninety-day time period; employer's claim that the time for filing the record did not begin to run until it paid its \$15.00 processing fee under subdivision (b)(1)(C) of this rule was in error. *Waste Mgmt. v. Estridge*, 210 S.W.3d 869 (2005).

—Findings of Fact.

There is no requirement in the Workers' Compensation Act that the court, on review of the commission's decisions, make detailed findings of fact or state specific conclusions of law. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979).

While it is the function of the Workers' Compensation Commission, and not the appellate courts, to act as fact finder in workers' compensation cases, it is the duty of the appellate court to reverse the Commission's decision when convinced that fair-minded persons, with the same facts before them, could not have reached the conclusion arrived at by the Commission. *Moser v. Arkansas Lime Co.*, 40 Ark. App. 113, 846 S.W.2d 188 (1993).

When the commission denies compensation, it is required to make findings sufficient to justify that denial, containing all the specific facts relevant to the contested issue so the reviewing court may determine whether the commission has resolved these issues in conformity with the law. *Shelton v. Freeland Pulpwood*, 53 Ark. App. 16, 918 S.W.2d 206 (1996).

Where the commission adopted the opinion of the Administrative Law Judge as its own and where that opinion was almost exclusively a recitation of testimony, rather than findings based on that testimony, the commission failed to make specific findings of the fact on which it relied to support its decision. *Shelton v. Freeland Pulpwood*, 53 Ark. App. 16, 918 S.W.2d 206 (1996).

—Remand.

Where court had remanded case to commission to obtain additional evidence since it felt that there was insufficient

evidence to allow claim but that the evidence was not sufficient to justify denial of claim, it was proper for court to remand the case a second time for a complete investigation as to whether or not claimant's injury arose out of and in the course of his employment and whether or not he suffered from an occupational disease. *Ward Furn. Mfg. Co. v. Reather*, 234 Ark. 151, 350 S.W.2d 691 (1961).

Court had no authority to determine the amount of the award and should remand the cause to the commission for the determination of the proper award. *W.C. Burrow Constr. Co. v. Langley*, 238 Ark. 992, 386 S.W.2d 484 (1965) (decision prior to 1976 amendment).

Where the administrative law judge summarized the testimony of the witnesses and did not make findings of fact based on that testimony, the court of appeals could not ascertain whether the commission correctly applied the law in denying benefits and therefore remanded the case for the commission to make specific findings of fact upon which it relied in making its decision. *Hardin v. Southern Compress Co.*, 34 Ark. App. 208, 810 S.W.2d 501 (1991).

Where employee's right to a one-time change of physician under § 11-9-514(a)(3)(A)(ii) was mandatory, the Arkansas Workers' Compensation Commission's denial of that right and its finding that the employer had fulfilled the obligation of providing adequate medical treatment, diagnostic testing, and consultation with specialists, under the provisions of § 11-9-508 was not supported by substantial evidence. *Collins v. Lennox Indus., Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002).

—Scope.

Court must give to findings of fact by the commission the same force and effect as a jury's verdict when supported by substantial evidence. *Lundell v. Walker*, 204 Ark. 871, 165 S.W.2d 600 (1942); *J.L. Williams & Sons v. Smith*, 205 Ark. 604, 170 S.W.2d 82 (1943); *Hughes v. Tapley*, 206 Ark. 739, 177 S.W.2d 429 (1944), overruled in part, *Southern Cotton Oil Div. v. Childress*, 237 Ark. 909, 377 S.W.2d 167 (Ark. 1964); *Johnson v. Little Rock Furn. Mfg. Co.*, 206 Ark. 1016, 178 S.W.2d 249 (1944); *Kloss v. Ford, Bacon & Davis*, 207 Ark. 115, 179 S.W.2d 172 (1944); *Fordyce*

Lumber Co. v. Shelton, 206 Ark. 1134, 179 S.W.2d 464 (1944); Barrentine v. Dierks Lumber & Coal Co., 207 Ark. 527, 181 S.W.2d 485 (1944), overruled in part, Southern Cotton Oil Div. v. Childress, 237 Ark. 909, 377 S.W.2d 167 (Ark. 1964); E.H. Noel Coal Co. v. Grilc, 215 Ark. 430, 221 S.W.2d 49 (1949) (preceding cases decided under prior law); Pearson v. Faulkner Radio Serv. Co., 220 Ark. 368, 247 S.W.2d 964 (1952); American Cas. Co. v. Jones, 224 Ark. 731, 276 S.W.2d 41 (1955); Hollifield v. Bird & Son, 227 Ark. 703, 301 S.W.2d 27 (1957); Fagan Elec. Co. v. Green, 228 Ark. 477, 308 S.W.2d 810 (1958); South Ark. Feed Mills, Inc. v. Roberts, 234 Ark. 1035, 356 S.W.2d 645 (1962); Arkansas Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Wilson & Co. v. Christman, 244 Ark. 132, 424 S.W.2d 863 (1968); Pearson v. Lake Lawrence Pulpwood Co., 247 Ark. 776, 447 S.W.2d 661 (1969); Treadway v. Riceland Foods, 268 Ark. 658, 594 S.W.2d 861 (Ct. App. 1980); Sunbeam Corp. v. Bates, 271 Ark. App. 385, 609 S.W.2d 102 (1980); Smart v. Biggs, 26 Ark. App. 141, 760 S.W.2d 882 (1988).

Evidence held sufficient to sustain commission's findings. J.L. Williams & Sons v. Smith, 205 Ark. 604, 170 S.W.2d 82 (1943); Baker v. Silaz, 205 Ark. 1069, 172 S.W.2d 419 (1943); Harris Motor Co. v. Pitts, 212 Ark. 145, 205 S.W.2d 21 (1947); Burdine v. Partee Flooring Mill, 218 Ark. 60, 234 S.W.2d 193 (1950) (preceding decisions under prior law); Independent Stave Co. v. Fulton, 251 Ark. 1086, 476 S.W.2d 792 (1972); Ethridge v. Alexander Brown & Associates, 258 Ark. 444, 527 S.W.2d 591 (1975); Hawthorne v. Davis, 268 Ark. 131, 594 S.W.2d 844 (1980); Smart v. Biggs, 26 Ark. App. 141, 760 S.W.2d 882 (1988); Public Employee Claims Div. v. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992).

Court may not try de novo cases heard by the commission. Solid Steel Scissors Co. v. Kennedy, 205 Ark. 958, 171 S.W.2d 929 (1943) (decision under prior law); Oak Lawn Farms v. Payne, 251 Ark. 674, 474 S.W.2d 408 (1971); Green v. Jacuzzi Bros., 269 Ark. 733, 600 S.W.2d 448 (Ct. App. 1980).

On appeal, evidence will be reviewed in the light most favorable to the commission's findings. Hughes v. Tapley, 206 Ark. 739, 177 S.W.2d 429 (1944), overruled in

part, Southern Cotton Oil Div. v. Childress, 237 Ark. 909, 377 S.W.2d 167 (Ark. 1964); American Cas. Co. v. Jones, 224 Ark. 731, 276 S.W.2d 41 (1955); J.P. Price Lumber Co. v. Adams, 258 Ark. 630, 527 S.W.2d 932 (1975); Hawthorne v. Davis, 268 Ark. 131, 594 S.W.2d 844 (1980); Kemper Ins. Co. v. Buchheit, 271 Ark. 458, 609 S.W.2d 660 (1980); West v. Smith, 225 Ark. 365, 282 S.W.2d 597 (1955); Fagan Elec. Co. v. Green, 228 Ark. 477, 308 S.W.2d 810 (1958); Clark v. Peabody Testing Serv., 265 Ark. 489, 579 S.W.2d 360 (1979); Allen Canning Co. v. McReynolds, 5 Ark. App. 78, 632 S.W.2d 450 (1982); Oller v. Champion Parts Rebuilders, Inc., 5 Ark. App. 307, 635 S.W.2d 276 (1982); Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982); Franklin v. Arkansas Kraft, Inc., 12 Ark. App. 66, 670 S.W.2d 815 (1984); Osage Oil Co. v. Rogers, 15 Ark. App. 319, 692 S.W.2d 786 (1985). But see Mid-State Constr. Co. v. Second Injury Fund, 295 Ark. 1, 746 S.W.2d 539 (1988); Southland Corp. v. Magers, 15 Ark. App. 360, 695 S.W.2d 380 (1985); Barnard v. B & M Constr., 52 Ark. App. 61, 915 S.W.2d 296 (1996).

Findings of the commission will not be disturbed on appeal if supported by substantial evidence. West v. Smith, 225 Ark. 365, 282 S.W.2d 597 (1955); Hixson Coal Co. v. Furstenberg, 225 Ark. 568, 284 S.W.2d 120 (1955); Boyd Excelsior Fuel Co. v. McKown, 226 Ark. 174, 288 S.W.2d 614 (1956); Johnson Auto Co. v. Kelley, 228 Ark. 364, 307 S.W.2d 867 (1957); White v. First Electric Co-op. Corp., 230 Ark. 925, 327 S.W.2d 720 (1959); Harper v. Henry J. Kaiser Constr. Co., 233 Ark. 398, 344 S.W.2d 856 (1961); Jolly v. J.M. Hampton & Sons Lumber Co., 234 Ark. 574, 353 S.W.2d 338 (1962); J.P. Price Lumber Co. v. Adams, 258 Ark. 630, 527 S.W.2d 932 (1975); Hawthorne v. Davis, 268 Ark. 131, 594 S.W.2d 844 (1980); Treadway v. Riceland Foods, 268 Ark. 658, 594 S.W.2d 861 (Ct. App. 1980); Franklin v. Arkansas Kraft, Inc., 5 Ark. App. 264, 635 S.W.2d 286 (1982); Franklin v. Arkansas Kraft, Inc., 12 Ark. App. 66, 670 S.W.2d 815 (1984); Young v. Heekin Canning Co., 13 Ark. App. 199, 681 S.W.2d 419 (1985).

Evidence insufficient to sustain commission's findings. Hall v. Pittman Constr. Co., 235 Ark. 104, 357 S.W.2d 263 (1962);

Dena Constr. Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

In reviewing the findings of fact of the commission on appeal, the court is limited to the sole determination of whether the findings are supported by substantial evidence. *Hughes v. Tapley*, 206 Ark. 739, 177 S.W.2d 429 (1944), overruled in part, *Southern Cotton Oil Div. v. Childress*, 237 Ark. 909, 377 S.W.2d 167 (Ark. 1964) (decision under prior law); *Tiner v. Baldwin*, 235 Ark. 1010, 363 S.W.2d 532 (1963); *Lybrand v. Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979); *Dedmon v. Dillard Dep't Stores, Inc.*, 3 Ark. App. 108, 623 S.W.2d 207 (1981).

The decision of the Workers' Compensation Commission on fact questions carries the same force and effect as a jury verdict, and even though the evidence would support another conclusion, or if the preponderance of the evidence would indicate a different result, the court will still affirm the commission if reasonable minds could reach the conclusion reached by the commission. *King v. Farmers Liquid Fertilizer*, 267 Ark. 798, 590 S.W.2d 327 (Ct. App. 1979).

The Court of Appeals does not interfere with the actions of the commission unless it finds that the commission has acted without or in excess of its authority, or that its order is not supported by substantial evidence. *Allen Canning Co. v. McReynolds*, 5 Ark. App. 78, 632 S.W.2d 450 (1982).

On appeal the Court of Appeals reviews the record only to determine if the commission's findings are supported by such substantial, relevant evidence as reasonable minds might accept as adequate to support their conclusion. *Morrow v. Mulberry Lumber Co.*, 5 Ark. App. 260, 635 S.W.2d 283 (1982); *Stephens v. St. Vincent Infirmary*, 15 Ark. App. 209, 691 S.W.2d 190 (1985); *Snow v. Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985).

The question presented to the Court of Appeals on reviewing a decision of the Workers' Compensation Commission is not whether the evidence would support findings contrary to those made by the commission, but whether the evidence supports the findings made by the commission; even if the decision of the commission is against the preponderance of the evidence, the Court of Appeals will not

reverse where its decision is supported by substantial evidence. *Snow v. Alcoa*, 15 Ark. App. 205, 691 S.W.2d 194 (1985); *Osage Oil Co. v. Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985). But see *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988); *Southland Corp. v. Magers*, 15 Ark. App. 360, 695 S.W.2d 380 (1985).

Where the denial of relief is based on the claimant's failure to prove entitlement by the preponderance of the evidence, the substantial evidence standard of review requires the court to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Day v. Central Day Care, Inc.*, 38 Ark. App. 241, 833 S.W.2d 783 (1992); *Barnard v. B & M Constr.*, 52 Ark. App. 61, 915 S.W.2d 296 (1996).

Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support a conclusion; the issue is not whether the appellate court might have reached a different result from that reached by the commission, or whether the evidence would have supported a contrary finding, but rather if reasonable minds could reach the result shown by the commission's decision, we must affirm the decision. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

— — Questions of Law or Fact.

Scintilla of evidence rule does not apply to a review of compensation award, and in such cases it is a question of law whether there is substantial evidence to warrant finding, but the question of the weight of the evidence is a question of fact and not of law. *J.L. Williams & Sons v. Smith*, 205 Ark. 604, 170 S.W.2d 82 (1943) (decision under prior law).

Conflicting testimony presents a fact question for the commission's determination and when supported by substantial testimony is to be viewed on appeal in favor of the finding. *Grimsley v. Manufacturers Furn. Co.*, 224 Ark. 769, 276 S.W.2d 64 (1955); *Hollifield v. Bird & Son*, 227 Ark. 703, 301 S.W.2d 27 (1957); *McKamie v. Kern-Trimble Drilling Co.*, 229 Ark. 86, 313 S.W.2d 378 (1958); *Kivett v. Redmond Co.*, 234 Ark. 855, 355 S.W.2d 172 (1962).

Sufficiency of evidence to support commission's findings of fact is a question of law. *West v. Smith*, 225 Ark. 365, 282 S.W.2d 597 (1955); *Hixson Coal Co. v.*

Furstenberg, 225 Ark. 568, 284 S.W.2d 120 (1955); *Boyd Excelsior Fuel Co. v. McKown*, 226 Ark. 174, 288 S.W.2d 614 (1956); *Johnson Auto Co. v. Kelley*, 228 Ark. 364, 307 S.W.2d 867 (1957); *Cummings v. United Motor Exch., Inc.*, 236 Ark. 735, 368 S.W.2d 82 (1963).

When there is doubt remaining as to a factual issue, and the doubt has been caused by conflicting or equivocal testimony, for the reviewing court to hold that the resolution of that doubt by the commission must always favor the claimant is to rob the commission of its fact-finding function which is definitively prescribed by the statute. *Johnson v. Valmac Indus.*, 269 Ark. 626, 599 S.W.2d 440 (1980).

The commission has the right to find the facts, but that right carries with it the duty to make and set out the crucial findings of fact and the supporting evidence. *McCoy v. Buckeye Cotton Oil*, 271 Ark. 638, 609 S.W.2d 670 (1980), *rev'd*, 272 Ark. 272, 613 S.W.2d 590 (1981).

— —Weight and Credibility of Evidence.

The court on appeal from a finding of fact made on sufficient competent evidence by the commission has not the legal right to set aside the finding merely because, in its opinion, it is contrary to the weight of the testimony. *J.L. Williams & Sons v. Smith*, 205 Ark. 604, 170 S.W.2d 82 (1943) (decision under prior law).

The credibility of witnesses is a matter which lies within the exclusive province of the Workers' Compensation Commission. *Kivett v. Redmond Co.*, 234 Ark. 855, 355 S.W.2d 172 (1962); *May v. Crompton-Arkansas Mills, Inc.*, 253 Ark. 1080, 490 S.W.2d 794 (1973); *Morrow v. Mulberry Lumber Co.*, 5 Ark. App. 260, 635 S.W.2d 283 (1982); *Southland Corp. v. Magers*, 15 Ark. App. 360, 695 S.W.2d 380 (1985).

The weight to be accorded the testimony of the claimant and the inferences to be drawn from it were to be considered by the commission and were not for *de novo* determination by the courts. *Oak Lawn Farms v. Payne*, 251 Ark. 674, 474 S.W.2d 408 (1971).

It is not the appellate court's function to weigh the credibility of conflicting witnesses on appeal. *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979).

There is no distinction between medical testimony and other evidence insofar as

the resolution of doubts is concerned in Workmen's Compensation proceedings. *Clark v. Peabody Testing Serv.*, 265 Ark. 489, 579 S.W.2d 360 (1979); *Public Employee Claims Div. v. Tiner*, 37 Ark. App. 23, 822 S.W.2d 400 (1992).

Questions of credibility and the weight to be given the evidence are exclusively within the province of the Workers' Compensation Commission; the reviewing court may not displace the commission's choice between two fairly conflicting views even though, if it were reviewing the matter *de novo*, the court might have made a different decision. *Roberts-McNutt, Inc. v. Williams*, 15 Ark. App. 240, 691 S.W.2d 887 (1985), *aff'd*, 288 Ark. 587, 708 S.W.2d 87 (Ark. 1986).

Question of credibility and the weight and sufficiency of the evidence are matters for determination by the commission, which is better equipped, by specialization and experience, to analyze and translate evidence into findings of fact than is the Court of Appeals. *Osage Oil Co. v. Rogers*, 15 Ark. App. 319, 692 S.W.2d 786 (1985). But see *Mid-State Constr. Co. v. Second Injury Fund*, 295 Ark. 1, 746 S.W.2d 539 (1988).

Weight and sufficiency of evidence are matters for determination by the commission. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988).

The reviewing court may not set aside the commission's decision unless it cannot conscientiously find from a review of the entire record that the evidence supporting the decision is substantial. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988).

On appeal, the court is required to view the evidence in the light most favorable to the findings of the commission and give the testimony its strongest probative value in favor of the order of the commission. The issue on appeal is not whether the evidence would have supported a finding contrary to the one made; the question is solely whether the evidence supports the finding made by the commission, and the decision must be upheld if supported by substantial evidence. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988).

Substantial evidence has been defined as more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support

a conclusion. It is of such force and character that it would with reasonable and material certainty and precision compel a conclusion one way or another. *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W.2d 128 (1988).

It is well settled that the commission must weigh the credibility of the witnesses, and appellate courts are not at liberty to judge the witnesses' credibility on review. *Wade v. Mr. C. Cavanaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988), superseded, 298 Ark. 363, 768 S.W.2d 521 (1989).

An appellate court must view the evidence in the light most favorable to the findings of the commission, and the standard of review is whether the commission's decision is supported by substantial evidence. *Wade v. Mr. C. Cavanaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988), superseded, 298 Ark. 363, 768 S.W.2d 521 (1989); *Welch's Laundry & Cleaners v. Clark*, 38 Ark. App. 223, 832 S.W.2d 283 (1992).

An appellate court will reverse a decision of the commission where convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached by the commission. *Wade v. Mr. C. Cavanaugh's*, 25 Ark. App. 237, 756 S.W.2d 923 (1988), superseded, 298 Ark. 363, 768 S.W.2d 521 (1989).

Jurisdiction.

Rule 1-2 of the Rules of the Sup. Court and the Court of Appeals cannot possibly deprive the Court of Appeals of jurisdiction of an appeal from the Workmen's Compensation Commission, as the jurisdiction of the Court of Appeals from the Workmen's Compensation Commission is not a part of the appellate jurisdiction of that court assigned to it by the Supreme Court pursuant to Const., Amend. 58, but original jurisdiction conferred upon that court by this section. *Houston Contracting Co. v. Young*, 271 Ark. 455, 609 S.W.2d 895 (1980).

Appellate court had jurisdiction to address the merits of a workers' compensation case where the court of appeals was merely substituted for the circuit court as the first court to review an administrative order. *Magnet Cove Sch. Dist. v. Barnett*, 81 Ark. App. 11, 97 S.W.3d 909 (2003).

Res Judicata.

The doctrine of res judicata applies only to final orders or adjudications, and the filing of a petition for review with the full commission within 30 days prevents the order of the administrative law judge from becoming final. *Wilson v. Cargill, Inc.*, 45 Ark. App. 174, 873 S.W.2d 171 (1994).

Where employer and its insurance carrier appellants did not appeal award within 30 days, the appellate court would not review the challenge to the award of benefits because that decision by the commission was res judicata. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

Timeliness of Appeal.

Rule of commission allowing 14 days from effective date of award in which to file a notice of appeal was ineffective as in direct conflict with the provision of former Workers' Compensation law. *Commercial Std. Ins. Co. v. Hill*, 203 Ark. 768, 158 S.W.2d 676 (1942).

The General Assembly has not enacted a law which would authorize the statutory appeal time to be extended, and unless the General Assembly provides such a remedy or procedure, neither administrative law judges nor the commission have the power to waive or otherwise extend the appeal time. *Cooper Indus. Prods. v. Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982).

Where there was evidence that the notice of claim had been mailed to the employer at an address at which he received his mail, and there was evidence from two witnesses that they saw a letter from the Workers' Compensation Commission, with a "green card" attached, on the employer's desk prior to that hearing, it was reasonable to conclude that the order the employer was appealing had been mailed and was received more than 30 days before the notice of appeal and petition were filed; therefore, the appeal was not timely. *Martin v. Young*, 17 Ark. App. 128, 705 S.W.2d 445 (1986).

The Workers' Compensation Commission erred in reversing the law judge's decision where the law judge's decision had not been timely appealed to the commission. *Lloyd v. Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986).

The timely filing of a notice of appeal is jurisdictional and should be raised by the court even if the parties do not raise it.

Lloyd v. Potlatch Corp., 19 Ark. App. 335, 721 S.W.2d 670 (1986).

The filing of a motion for reconsideration, or rehearing, does not extend the time to file the notice of appeal. Hill v. Travenol Labs., Inc., 24 Ark. App. 116, 748 S.W.2d 356 (1988).

The commission has no authority to entertain a petition for rehearing after the expiration of the 30-day appeal period, and no authority to grant a motion to vacate. United States Fid. & Guar. Co. v. Brewer, 52 Ark. App. 214, 916 S.W.2d 773 (1996).

No provision of the statute addresses any changes in the time for the notice of appeal where a post-award motion has been filed. Rogers v. International Paper Co., 66 Ark. App. 34, 988 S.W.2d 23 (1999).

Appeal from a decision in a workers' compensation case was dismissed as untimely where an attorney from Texas filed notices of appeal on behalf of an insurer since he failed to comply with Ark. R. Admis. Bar XIV until later. As such, the pleadings were rendered a nullity. Clarendon Am. Ins. Co. v. Hickok, 370 Ark. 41, 257 S.W.3d 43 (2007).

Workers' Compensation Commission abused its discretion in dismissing as untimely a worker's pro se notice of appeal from an order of an administrative law judge (ALJ) denying permanent total disability for carpal tunnel injuries because the ALJ's order could not become final until 30 days after the worker received a copy where the worker's attorney was disbarred 26 days after receiving a copy and thus did not have a full 30 days to appeal. Kirkendolph v. DF&A Revenue Servs. Div., 2009 Ark. App. 629, — S.W.3d — (2009).

Cited: John Bishop Constr. Co. v. Orlicek, 224 Ark. 182, 272 S.W.2d 820 (1954); Cole v. Hendry Corp., 230 Ark. 100, 321 S.W.2d 377 (1959); Mason v. Lauck, 232 Ark. 891, 340 S.W.2d 575 (1960); Singer Co. v. Johnston, 243 Ark. 679, 421 S.W.2d 341 (1967); Herman Wilson Lumber Co. v. Hughes, 245 Ark. 168, 431 S.W.2d 487 (1968); Davis v. Stearns-Rogers Constr. Co., 248 Ark. 344, 451 S.W.2d 469 (1970); Missouri City Stone, Inc. v. Peters, 257 Ark. 917, 521 S.W.2d 58 (1975); American

Can Co. v. Pettyjohn, 258 Ark. 98, 522 S.W.2d 358 (1975); Johnson v. Houston Gen. Ins. Co., 259 Ark. 724, 536 S.W.2d 121 (1976); Harris v. Daniels, 263 Ark. 897, 567 S.W.2d 954 (1978); Lybrand v. Arkansas Oak Flooring Co., 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979); Bibler Bros. v. Ingram, 266 Ark. 969, 587 S.W.2d 841 (1979); Richardson v. Rogers, 266 Ark. 980, 588 S.W.2d 465 (Ct. App. 1979); Conway Convalescent Ctr. v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (Ct. App. 1979); Travelers Ins. Co. v. Heidelberger, 267 Ark. 971, 593 S.W.2d 70 (Ct. App. 1980); Salant & Salant, Inc. v. Williams, 267 Ark. 987, 593 S.W.2d 63 (Ct. App. 1980); Johnson v. Valmac Indus., 269 Ark. 626, 599 S.W.2d 440 (1980); Ozark Rustic Homes v. Albright, 269 Ark. 696, 600 S.W.2d 420 (Ct. App. 1980); Hassen v. Wickes Lumber Co., 270 Ark. 922, 606 S.W.2d 611 (1980); Foust v. Ward Sch. Bus Mfg. Co., 271 Ark. 411, 609 S.W.2d 88 (1980); Ashcraft v. Quimby, 2 Ark. App. 174, 617 S.W.2d 390 (1981); Travelers Ins. Co. v. Cole, 3 Ark. App. 183, 623 S.W.2d 848 (1989); State Second Injury Fund v. Girtman, 16 Ark. App. 155, 698 S.W.2d 514 (1985); Huckaby v. Cargill, Inc., 20 Ark. App. 164, 725 S.W.2d 856 (1987); Webb v. Workers' Comp. Comm'n, 292 Ark. 349, 730 S.W.2d 222 (1987); Baldor Elec. Co. v. Jones, 29 Ark. App. 80, 777 S.W.2d 586 (1989); Baldwin v. Club Prods. Co., 302 Ark. 404, 790 S.W.2d 166 (1990); Tyson Foods, Inc. v. Watkins, 31 Ark. App. 230, 792 S.W.2d 348 (1990); Sunbelt Couriers v. McCartney, 303 Ark. 522, 798 S.W.2d 92 (Ark. 1990); Scarbrough v. Cherokee Enters., 33 Ark. App. 139, 803 S.W.2d 561 (1991); Scarbrough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Johnson v. American Pulpwood Co., 38 Ark. App. 6, 826 S.W.2d 827 (1992); Moser v. Arkansas Lime Co., 40 Ark. App. 108, 842 S.W.2d 456 (1992); Tillman v. Baldwin & Shell Constr., 58 Ark. App. 177, 948 S.W.2d 118 (1997); Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998); Shepard v. ALCOA, 76 Ark. App. 292, 64 S.W.3d 786 (2002); Maupin v. Pulaski County Sheriff's Office, 90 Ark. App. 1, 203 S.W.3d 668 (2005); Plane Techs v. Keno, 103 Ark. App. 121, 286 S.W.3d 774 (2008).

11-9-712. Enforcement of order or award.

If any employer fails to comply with a final compensation order or award, any beneficiary of the order or award, or the Workers' Compensation Commission, may file a certified copy of the order or award in the office of the circuit clerk of any county in this state where any property of the employer may be found. At that time, the circuit clerk shall enter the order or award in the judgment record of the county, and the order or award so recorded shall be a judgment and lien as are judgments of the circuit court, and enforceable as such.

History. Init. Meas. 1948, No. 4, § 25, Acts 1949, p. 1420; A.S.A. 1947, § 81-1325.

CASE NOTES

ANALYSIS

In General.
Partnerships.
Scope of Court's Jurisdiction.

In General.

The benefits payable pursuant to the Workers' Compensation Act, and the procedure set out in that act for obtaining those benefits, constitute an exclusive remedy, and that remedy precludes an action at law, even for an intentional tort arising out of the nonpayment of benefits, where the statutory remedies for late payment include: (1) a twenty percent penalty plus interest for the late payment of an award, (2) a provision by which the Workers' Compensation Commission may require a bond from an employer to insure payment, and (3) a provision that a final award may be filed with the circuit clerk which causes it to become a lien on the property of the employer. *Cain v. National Union Life Ins. Co.*, 290 Ark. 240, 718 S.W.2d 444 (1986).

Partnerships.

An award of the Workers' Compensation Commission entered against a partnership in its firm name only and which makes no reference to the individual copartners may not be enforced as a judgment by garnishment or execution against

a copartner. *Pate v. Martin*, 13 Ark. App. 182, 681 S.W.2d 410 (1985).

Scope of Court's Jurisdiction.

This section means that a money allowance, or a liquidated award, which has become final, may be filed with the circuit clerk, and it then becomes a judgment and lien the same as a circuit court judgment. The section does not in any way give the circuit court jurisdiction to determine what is a "reasonable and necessary" expense pursuant to an order or award of the Workers' Compensation Commission. *Baldwin v. Club Prods. Co.*, 302 Ark. 404, 790 S.W.2d 166 (1990).

Cited: *Cole v. Hendry Corp.*, 230 Ark. 100, 321 S.W.2d 377 (1959); *Herman Wilson Lumber Co. v. Hughes*, 245 Ark. 168, 431 S.W.2d 487 (1968); *Davis v. Stearns-Rogers Constr. Co.*, 248 Ark. 344, 451 S.W.2d 469 (1970); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Ozark Rustic Homes v. Albright*, 269 Ark. 696, 600 S.W.2d 420 (Ct. App. 1980); *Foust v. Ward Sch. Bus Mfg. Co.*, 271 Ark. 411, 609 S.W.2d 88 (1980); *Ashcraft v. Quimby*, 2 Ark. App. 174, 617 S.W.2d 390 (1981); *Travelers Ins. Co. v. Cole*, 3 Ark. App. 183, 623 S.W.2d 848 (1981); *State Second Injury Fund v. Girtman*, 16 Ark. App. 155, 698 S.W.2d 514 (1985); *Webb v. Workers' Comp. Comm'n*, 292 Ark. 349, 730 S.W.2d 222 (1987).

11-9-713. Modification of awards.

(a)(1) Except where a joint petition settlement has been approved, the Workers' Compensation Commission may review any compensation order, award, or decision.

(2) This may be done at any time within six (6) months of termination of the compensation period fixed in the original compensation order or award, upon the commission's own motion or upon the application of any party in interest, on the ground of a change in physical condition or upon proof of erroneous wage rate.

(3) Upon the review, the commission may make an order or award terminating, continuing, decreasing, or increasing for the future the compensation previously awarded, subject to the maximum limits provided for in this chapter.

(b) The review and subsequent order or award shall be made in accordance with the procedure prescribed in § 11-9-704.

(c) No review shall affect any compensation paid pursuant to a prior order or award.

(d) The commission may, at any time, correct any clerical error in any compensation order or award.

(e) Aging and the effects of aging on a compensable injury are not to be considered in determining whether there has been a change in physical condition. Nor shall aging or the effect of aging on a compensable injury be considered in determining permanent disability pursuant to this section or any other section in this chapter. The purpose and intent of this section is to annul any and all case law inconsistent herewith, including *International Paper Co. v. Tuberville*, 302 Ark. 22, 786 S.W.2d 830 (1990).

History. Init. Meas. 1948, No. 4, § 26, Acts 1949, p. 1420; A.S.A. 1947, § 81-1326; Acts 1993, No. 796, § 31.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

RESEARCH REFERENCES

Ark. L. Rev. Only Those Who Die Young Fail to Grow Old; *International Paper Co. v. Tuberville*: The Natural Aging Process and Arkansas Workers' Compensation Law, 45 Ark. L. Rev. 243.

CASE NOTES

ANALYSIS	Evidence.
Constitutionality.	Grounds.
Construction.	Issues for Review.
Applicability.	Res Judicata.
Authority.	Standard of Review.
	Timeliness.

Constitutionality.

Due process of law dictates that an employee who has been denied benefits should be afforded the same opportunity to have his claim reconsidered where he has discovered subsequently to the denial of benefits that his was a meritorious claim. *Walker v. J & J Pest Control*, 270 Ark. App. 941, 606 S.W.2d 597 (1980).

Construction.

Where there was doubt as to whether employee's claim for additional compensation after receipt of compensation was governed by the six-month period provided by this section for modification of an award or by § 11-9-702(b) permitting a claim for additional compensation within one year from date of last payment of compensation, the act would be construed in favor of the longer period provided by § 11-9-702. *Reynolds Metals Co. v. Brumley*, 226 Ark. 388, 290 S.W.2d 211 (1956).

There is only one consistent, harmonious construction to be placed on the relationship between § 11-9-702(b) and this section in an effort to make them both effective, viz., where a claimant seeks additional benefits after a final award, this section governs as to the grounds required and § 11-9-702(b) governs the period of limitation for all claims for additional benefits whether or not there has been a final award. *Southern Wooden Box Co. v. Smith*, 5 Ark. App. 14, 631 S.W.2d 620 (1982).

Although subdivision (a)(1) of this section grants the commission the authority to modify a final award subsequent to the expiration of the time for appeal, under subdivision (a)(2) the commission may only do so upon a showing of a change in physical condition or proof of an assignment of an erroneous wage rate. *United States Fid. & Guar. Co. v. Brewer*, 52 Ark. App. 214, 916 S.W.2d 773 (1996).

Applicability.

Commission was correct in refusing to allow claimant to reopen her claim where petition was not filed within the time to appeal and where petition followed an opinion by an administrative law judge that claimant failed to show entitlement to additional benefits since this section applies only to cases where a previous order or award of compensation has been made. *Smith v. Servomation*, 8 Ark. App. 274, 651 S.W.2d 118 (1983).

Employer could not contend that it was entitled to a modification of the law judge's decision pursuant to this section where the employer had never alleged that such a change had occurred after the law judge's decision. *Lloyd v. Potlatch Corp.*, 19 Ark. App. 335, 721 S.W.2d 670 (1986).

Authority.

Rules 13 and 23 of the commission's rules authorize reasonableness on the part of the commission in a variety of circumstances dealing with the prosecution of claims for benefits, in order that the ends of justice may be served; hence, a liberal construction of the commission's rules lends support to the argument that the commission does have authority to entertain a petition for rehearing when based on reasonable grounds. *Walker v. J & J Pest Control*, 270 Ark. App. 941, 606 S.W.2d 597 (1980).

Although this chapter does not provide for rehearing or reconsideration procedures, the commission does have the authority under this section to modify a final award, but only upon a showing of a change in physical condition or proof of an assignment of an erroneous wage rate. *Cooper Indus. Prods. v. Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982).

Evidence.

Substantial evidence held to support commission's conclusion that claimant's condition had not changed. *Marrable v. Southern LP Gas, Inc.*, 25 Ark. App. 1, 751 S.W.2d 15 (1988).

Grounds.

Where there was competent testimony that there were material changes in condition, decision of commission refusing to open award would be affirmed. *Bookout v. Reynolds Mining Co.*, 213 Ark. 198, 209 S.W.2d 881 (1948) (decision under prior law).

Where there is competent testimony that claimant's condition has not changed, there is substantial evidence to sustain the commission's finding that claimant did not sustain a worsening of his condition which would entitle him to additional benefits. *White v. First Electric Co-op. Corp.*, 230 Ark. 925, 327 S.W.2d 720 (1959).

Where natural consequences of injury caused additional problems years later, an

increase in compensation benefits would be granted unless the additional problems were a result of an independent intervening cause attributable to claimant's own negligence or misconduct. *Home Ins. Co. v. Logan*, 255 Ark. 1036, 505 S.W.2d 25 (1974).

Where the claimant filed a petition for rehearing of the denial of disability benefits on the ground that there was newly discovered evidence, but it appeared that all of the evidence which he claimed was newly discovered was actually within his knowledge before the case was originally submitted to and decided by the commission, the motion for a rehearing was properly denied. *Walker v. J & J Pest Control*, 6 Ark. App. 171, 639 S.W.2d 748 (1982).

A claimant is not entitled under Arkansas law to obtain additional benefits after a final award without a showing that he has experienced a change in physical condition; a change in economic conditions is not a sufficient ground for reopening an award. *Southern Wooden Box Co. v. Smith*, 5 Ark. App. 14, 631 S.W.2d 620 (1982).

Where aging process exacerbated original compensable injury, claimant was entitled to modification of award. *Tuberville v. International Paper Co.*, 28 Ark. App. 196, 771 S.W.2d 805 (1989), *aff'd*, 302 Ark. 22, 786 S.W.2d 830 (Ark. 1990).

Where claimant did not argue in his motion to vacate filed with the commission that his physical condition had changed since the order was entered or that there was an assignment of an erroneous wage rate, but argued instead that claimant experienced a change in physical condition prior to the entry of the award but subsequent to the change in workers' compensation carriers, such argument was clearly outside the scope of this section. *United States Fid. & Guar. Co. v. Brewer*, 52 Ark. App. 214, 916 S.W.2d 773 (1996).

Issues for Review.

Where commission's finding that no causal connection existed between death of employee and his original illness or injury was supported by substantial evidence, the finding was in effect a finding that no permanent disability was occasioned by the first illness and contention on appeal from denial of death benefits that claim for permanent partial disability

was based on modification of prior award was not required to be discussed. *Chambers v. Bigelow-Liptak Corp.*, 235 Ark. 1039, 363 S.W.2d 908 (1963).

In a workers' compensation matter, an order modifying a previous award of wage loss based upon permanent partial disability benefits pursuant to subdivision (a)(2) of this section was modified where the accrual of benefits began at the time the first order in the case addressing the modification was entered, August 15, 2003, which was the order entered by the ALJ. *O'Hara v. J. Christy Constr. Co.*, 101 Ark. App. 212, 272 S.W.3d 842 (2008), rehearing denied, — Ark. App. —, 272 S.W.3d 842 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 324 (Apr. 16, 2008).

Res Judicata.

Where the question of interstate commerce was heard and determined in a Workman's Compensation claim case, the same question could not be raised again in a claim for death benefits arising out of the same injury. *Bell v. Batesville White Lime Co.*, 217 Ark. 379, 230 S.W.2d 643 (1950) (decision under prior law).

If an employee dies as a result of the disability for which he has been awarded compensation, the cause of the disability is *res judicata*. *Triebisch v. Athletic Mining & Smelting Co.*, 225 Ark. 199, 280 S.W.2d 719 (1955).

The doctrine of *res judicata*, forbidding the reopening of matters once judicially determined by competent authority, applies to the decisions of the Workers' Compensation Commission; having once determined that the claimant only suffered 55% permanent disability to the body as a whole, the commission cannot 12 years later say that the claimant was totally disabled at that earlier time. *Tuberville v. International Paper Co.*, 18 Ark. App. 210, 711 S.W.2d 840 (1986).

Workers' Compensation Commission erred when it held that claimant's claim for additional wage-loss disability benefits or permanent and total disability, over and above a March 1997 award of 20 percent wage-loss disability, was barred by *res judicata* because claimant's more recent claim was based on changes in his condition post-1997, and the Commission erred as a matter of law when it required objective findings to support a change in

physical condition relative to his wage-loss claim. *O'Hara v. J. Christy Constr. Co.*, 94 Ark. App. 143, 227 S.W.3d 443 (2006).

Standard of Review.

The question presented to the appellate court reviewing the Commission's decision is not whether the evidence would support findings contrary to those made by the Commission, but whether the evidence supports the findings made by the Commission; even if the Commission's decision is against the preponderance of the evidence, the court will not reverse where its decision is supported by substantial evidence. *International Paper Co. v. Tuberville*, 302 Ark. 22, 786 S.W.2d 830 (Ark. 1990).

Timeliness.

Where an administrative law judge filed an opinion denying claimant additional benefits and the claimant did not file a timely appeal from that order, a subsequent attempt by the administrative law judge to amend his original order and award benefits to the claimant based on a doctor's clarification of the claimant's disability was improper, because the order denying benefits became final when no appeal was sought within 30 days. *Cooper Indus. Prods. v. Meadows*, 5 Ark. App. 205, 634 S.W.2d 400 (1982).

Cited: *Cook v. Brown*, 246 Ark. 11, 436 S.W.2d 482 (1969); *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

11-9-714. Costs in proceedings brought without reasonable grounds.

If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect to the claim or order have been instituted or continued without reasonable grounds, the cost of the proceedings shall be assessed against the party who has instituted or continued the proceedings.

History. Init. Meas. 1948, No. 4, § 30, Acts 1949, p. 1420; A.S.A. 1947, § 81-1330.

Cross References. Frivolous actions, state required to pay costs and fees for bringing, § 16-68-508.

CASE NOTES

Construction.

This section provides only for costs, not attorney's fees. *Couch v. First State Bank*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

11-9-715. Fees for legal services.

(a)(1)(A) Fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission.

(B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee. Attorney's fees shall not be awarded on medical benefits or services except as provided in subdivision (a)(4) of this section.

(2)(A) Whenever the commission finds that a claim against the Treasurer of State, as custodian of the Second Injury Trust Fund or as custodian of the Death and Permanent Total Disability Trust Fund, has been controverted, in whole or in part, the commission shall

direct that fees for legal services be paid from the fund, in addition to compensation awarded, and the fees shall be allowed only on the amount of compensation controverted and awarded from the fund.

(B)(i) In all other cases whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid to the attorney for the claimant as follows: One-half ($\frac{1}{2}$) by the employer or carrier in addition to compensation awarded; and one-half ($\frac{1}{2}$) by the injured employee or dependents of a deceased employee out of compensation payable to them.

(ii) The fees shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded.

(iii) However, the commission shall not find that a claim has been controverted if the claimant or his or her representative has withheld from the respondent during the period of time allotted for the respondent to determine its position any medical information in his or her possession which substantiates the claim.

(C)(i) Whenever the commission finds that a claim has not been controverted but further finds that bona fide legal services have been rendered in respect to the claim, then the commission shall direct the payment of the fees by the injured employee or dependents of a deceased employee out of the compensation awarded.

(ii) In determining the amount of fees when a claim is not controverted, the commission shall use its discretion in awarding an attorney's fee not to exceed twenty-five percent (25%) and in so doing shall take into consideration the nature, length, and complexity of the services performed and the benefits resulting to the compensation beneficiaries.

(3) In any case where attorney's fees are allowed by the commission, the limitations expressed in the first sentence herein shall apply.

(4) Medical providers may voluntarily contract with the attorney for the claimant to recover disputed bills, and the attorney may charge a reasonable fee to the medical provider as a cost of collection.

(b)(1) If the claimant prevails on appeal, the attorney for the claimant shall be entitled to an additional fee at the full commission and appellate court levels in addition to the fees provided in subdivision (a)(1) of this section, the additional fee to be paid equally by the employer or carrier and by the injured employee or dependents of a deceased employee, as provided above and set by the commission or appellate court.

(2) The maximum fees allowable pursuant to this subsection shall be the sum of five hundred dollars (\$500) on appeals to the full commission from a decision of the administrative law judge and the sum of one thousand dollars (\$1,000) on appeals to the Court of Appeals or Supreme Court from a decision of the commission.

(3) In determining the amount of fees, the commission and the court shall take into consideration the nature, length, and complexity of the services performed and the benefits resulting to the compensation beneficiary.

(c)(1) The fee for legal services rendered by the claimant's attorney in connection with a change of physician requested by the injured employee, controverted by the employer or carrier and awarded by the commission, shall be two hundred dollars (\$200).

(2) No additional fee shall be payable with respect to uncontroverted charges incurred in connection with treatment by the new physician.

(d)(1) No fees for legal services rendered by the claimant's attorney with respect to the preliminary conference procedure shall be awarded by the commission.

(2) However, the claimant's attorney or other representative may charge a reasonable fee to the claimant for representation in connection with the conference.

(3) Unless compensability of a claim is controverted by the employer or carrier, fees for legal services by the claimant's attorney with respect to disability for loss of wage-earning capacity shall be payable only for amounts awarded at a contested hearing which exceed the amount, if any, which the employer or carrier agreed in writing to accept at the preliminary conference.

(e) The amendments made by this act of 2001 regarding attorney's fees contained in this section shall be effective with respect to benefits payable in connection with disability or death due to injuries occurring on or after July 1, 2001.

History. Init. Meas. 1948, No. 4, § 32, Acts 1949, p. 1420; Acts 1959, No. 144, § 2; 1975 (Extended Sess., 1976), No. 1227, § 16; 1979, No. 253, § 8; 1979, No. 822, § 1; 1981, No. 290, § 12; 1986 (2nd Ex. Sess.), No. 10, § 12; A.S.A. 1947, § 81-1332; reen. Acts 1987, No. 1015, § 16; Acts 2001, No. 1281, § 5.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 1015, § 16. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Subsection (e) (formerly (f)) is printed as enacted. Former subsection (f) may still be effective as to injuries occurring on or after July 1, 1986 and before July 1, 2001. It read, "(f) The amendments regarding attorney's fees contained in this section

shall be effective with respect to benefits payable in connection with disability or death due to injuries occurring on or after July 1, 1986."

Publisher's Notes. The Per Curiam Order of the Supreme Court of Arkansas, dated September 1, 1993, provided, in part, that subdivision (b)(1) of this section provides for additional attorney's fees if the claimant prevails on appeal, but this section neither expressly provides for nor expressly prohibits an additional award of attorney's fees in cases where the claimant has been required to defend his award of workers' compensation benefits through two separate appeals brought by the employer to the Supreme Court. Construing the attorney's fee provision liberally and in accordance with the remedial purposes of § 11-9-704(c)(3), the Supreme Court held that an additional award of attorney's fees is authorized by the statute under such circumstances.

RESEARCH REFERENCES

Ark. L. Rev. Workmen's Compensation — Attorney's Fees and Amount of Recovery, 8 Ark. L. Rev. 195.

Taxability of Attorneys' Fees Cost, 9 Ark. L. Rev. 70.

One State's Experience With the Statutory Remedy for Insurers' Delays a Problem of Payment, 10 Ark. L. Rev. 439.

U. Ark. Little Rock L.J. Karber, Survey of Arkansas Law: Workers' Compensation, 2 U. Ark. Little Rock L.J. 294.

Survey of Legislation, 2001 Arkansas General Assembly, Labor Law, 24 U. Ark. Little Rock L. Rev. 493.

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Where the claimant lost on his appeal from an administrative law judge's decision to the Workers' Compensation Commission, but he won on his cross-appeal, the court regarded the claimant as having prevailed on appeal and therefore he was entitled to an award of attorney fees since this chapter should be interpreted liberally in favor of the claimant. *Owens Country Sausage v. Crane*, 268 Ark. 732, 594 S.W.2d 872 (Ct. App. 1980).

The legislature intended § 11-9-716 and this section to be read in conjunction with one another and saw no conflict between the two statutes; the legislature felt strongly that the commission should be able to award lump-sum attorneys' fees. Had the legislature perceived any conflict between the two sections they would have undoubtedly repealed this section. *International Paper Co. v. McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984).

The legislature's use of the word "and" between "controverted" and "awarded" in subsection (a)(2)(B)(ii) means that attor-

ney's fees in workers' compensation cases are contingent upon not only the amount controverted but also the amount awarded. *Cleek v. Great S. Metals*, 62 Ark. App. 177, 970 S.W.2d 304 (1998), rev'd, *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998).

Appellate court overruled the assertion that the Arkansas Workers' Compensation Commission should have vacated rather than reversed the award of attorney's fees for the claimant, because the Commission's reversing of the award of attorney's fees rather than vacating the award had no bearing on whether the claimant was entitled to attorney's fees on appeal. *Sierra v. Griffin Gin*, 100 Ark. App. 113, 265 S.W.3d 129 (2007), rehearing denied, *Sierra v. Griffen Gin*, — Ark. App. —, — S.W.3d —, 2007 Ark. App. LEXIS 775 (Nov. 7, 2007), superseded, 374 Ark. 320, 287 S.W.3d 556 (2008).

Purpose.

Attorney's fees in Workers' Compensation cases are provided by statute in Arkansas as a matter of public policy to enable injured workers to obtain the services of an attorney in settlement of controverted claims. *Aluminum Co. of America v. Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982).

One of the purposes of this section is to place the burden of litigation expense on the party which makes litigation necessary by controverting the claim; placing this responsibility on the employer is intended to encourage prompt and honest settlements and to compensate an employee for delay. It is not the purpose of this section to compel an employer to make settlement of a claim for which he has no responsibility and is not liable, or to compensate an employee for delay in

collecting funds from the Second Injury Fund for which that employer is likewise not liable. *Prier Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988).

A maxim of workers' compensation law is that when the commission finds that a case has been controverted, in whole or in part, the commission shall direct the payment of legal fees by the employer or carrier in addition to the compensation awarded. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

Applicability.

This section which provides that attorneys' fees shall be allowed only on the amount of compensation controverted and awarded, is not limited by the application of § 11-9-502(b); thus an award of attorneys' fees on the controverted portion of the award in lump sum based upon the present value computation of claimant's compensation benefits, unlimited by § 11-9-502(b), but with appropriate credit for fees previously paid, was proper. *Hot Spring County Bicentennial Park v. Walker*, 271 Ark. 688, 610 S.W.2d 268 (1981).

This section does not permit the award of attorney's fees against the Second Injury Trust Fund, since such entity is not an employer or carrier within the meaning of this section. *Second Injury Fund v. Furman*, 62 Ark. App. 194, 972 S.W.2d 255 (1998), *aff'd* 336 Ark. 10, 983 S.W.2d 923 (1999).

Amendment of Section.

An initiative petition filed under Ark. Const. Amend. 7 was insufficient because the ballot title was misleading due to various omissions and misstatements in its terms, particularly with respect to its hidden amendments of this section, regarding attorney's fees, and § 11-9-704, regarding the construction of this chapter. *Bailey v. McCuen*, 318 Ark. 277, 884 S.W.2d 938 (Ark. 1994).

Amount.

Award of attorney's fee proper. *Lundell v. Walker*, 204 Ark. 871, 165 S.W.2d 600 (1942) (decision under prior law); *Brown v. W.H. Patterson Constr. Co.*, 235 Ark. 465, 361 S.W.2d 13 (1962); *Garner v. American Can Co.*, 246 Ark. 746, 440 S.W.2d 210 (1969).

The attorney's fees in a workers' compensation case, wherein the employer's

insurer denies all liability, should consist of a percentage of the amounts expended for medical services and hospitalization in addition to a percentage of the cash awarded to the client, since the compensation from which the fees are to be derived include medical and hospital services. *Ragon v. Great Am. Indem. Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954).

Workers' Compensation Commission's determination with respect to attorney's fees will not be disturbed by Supreme Court unless clearly wrong or a gross abuse of discretion. *Littlejohn v. Earle Indus. Inc.*, 239 Ark. 439, 389 S.W.2d 898 (1965).

Evidentiary hearing to determine whether maximum attorney fees should be awarded to the claimant's attorney found to be necessary, since such a hearing is necessary only when the record indicates that a bare minimum of services was provided; and the claimant's attorney clearly provided more than a minimum of services. *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980).

The award of attorney's fees is not a penalty but an award of reasonable compensation for services necessarily rendered to compensation claimants based on consideration by the Workers' Compensation Commission of the various factors usually taken into consideration in determining reasonable attorney's fees. *Tyson Foods, Inc. v. Fatherree*, 16 Ark. App. 41, 696 S.W.2d 782 (1985).

Attorneys' fees in a Workers' Compensation case should consist of a percentage of the amounts expended for medical services and hospitalization in addition to a percentage of the cash awarded to the claimant, since the compensation from which the fees are to be derived includes medical and hospital services. *Universal Underwriters Ins. Co. v. Bussey*, 17 Ark. App. 47, 703 S.W.2d 459 (1986).

Where the claimant was totally disabled, but his employment caused only 10% of that disability, attorneys' fees should have been computed upon the basis of the compensation due from the employer, not upon the entire compensation payable for the claimant's total disability. *Prier Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988).

This section does not provide any set figure as "statutory attorney's fees"; rather, the Commission is to determine

and award a reasonable fee within specific limitations. *Sonic Drive-In v. Wade*, 36 Ark. App. 4, 816 S.W.2d 889 (1991).

The claimant prevailed in his appeal to the court of appeals, which remanded for reconsideration, and claimant's attorney was allowed the maximum fee under this section. *Crow v. Weyerhaeuser Co.*, 41 Ark. App. 225, 852 S.W.2d 334 (1993).

Subdivision (b)(1) of this section neither expressly provides for nor expressly prohibits an additional award of attorney's fees in cases where the claimant has been required to defend his award of workers' compensation benefits through two separate appeals brought by the employer; construing the attorney's fees provision liberally and in accordance with the remedial purposes given in § 11-9-704(c)(3), an additional award of attorney's fees is authorized. *Cagle Fabricating & Steel, Inc. v. Patterson*, 43 Ark. App. 79, 861 S.W.2d 114 (1993).

Employer who demonstrated that it was liable for only a portion of its worker's present disability was entitled to a reduction in the amount of attorney's fees awarded. *Stucco Plus v. Rose*, 327 Ark. 314, 938 S.W.2d 556 (Ark. 1997).

—Amount of Award.

Where the employer paid all but \$35.00 of the claimant's medical expenses, but never recognized liability for her injury, thereby forcing the claimant to try the case fully on the merits in order to be able to seek future medical expenses, she was entitled to recover attorney fees based on the entire amount of her medical expenses, rather than just the \$35.00 awarded to her. *Cleek v. Great Southern Metals*, 335 Ark. 342, 981 S.W.2d 529 (1998).

—Maximum.

Attorney was not entitled to keep amount received under agreement with client that any amount recovered would be divided equally between attorney and client, but he was entitled to only the amount, as limited by this section, which was approved by the commission. *Robinson v. Keaton*, 239 Ark. 600, 393 S.W.2d 231 (1965).

There was no abuse of the commission's discretion in limiting the attorney's fee to the maximum allowable percentage of the accrued amount due rather than on the

amount paid and to be paid under the award. *Sisk v. Philpot*, 244 Ark. 79, 423 S.W.2d 871 (1968).

A claim for additional compensation is to be treated as a continuation of the original demand for compensation, and in fixing the attorney's fee, the action of the commission in the parent case is to be considered, while the maximum fee shall be within the fixed limitations of this section and shall not exceed certain percentages of compensation awarded. *Norsworthy v. Georgia-Pacific Corp.*, 249 Ark. 159, 458 S.W.2d 401 (1970).

Evidence sufficient to find abuse of discretion to award the maximum fee. *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976).

There is no language in the statutes limiting the award of the attorneys' fees to amounts for which the employer and its carrier both controvert and owe; the test is that fees are calculated on the amount controverted and awarded. *Hot Spring County Bicentennial Park v. Walker*, 271 Ark. 688, 610 S.W.2d 268 (1981).

This section does not authorize the arbitrary allowance of maximum fees in every case; it specifically sets out those factors which are to be considered in arriving at a reasonable attorney's fee. *Masonite Corp. v. Mitchell*, 16 Ark. App. 209, 699 S.W.2d 409 (1985).

Evidence insufficient to find an abuse of discretion in awarding the maximum allowable fee. *Masonite Corp. v. Mitchell*, 16 Ark. App. 209, 699 S.W.2d 409 (1985).

Appeal.

The plea by claimant seeking an additional attorney's fee allowance in connection with an appeal to the Supreme Court must be denied as the statute does not authorize such an allowance, only the commission being empowered to award fees for legal services, further, the maximum fee having been allowed in this case. *Sparks Mem. Hosp. v. Walton*, 229 Ark. 1014, 320 S.W.2d 102 (1959).

Where there was no showing of what services were rendered in behalf of claimant by his attorney on an appeal from the administrative law judge, the attorney should not have been awarded an additional fee relating to the appeal. *Aluminum Co. of America v. Wilson*, 262 Ark. 602, 559 S.W.2d 710 (1978).

Where the claimant suffered an undisputably compensable injury to his finger,

but the payment of compensation benefits was significantly delayed due to delay by employer's physician, the burden of that delay should rest on the employer and since the record contained no evidence that the employer attempted to get the physician to expedite the report, the delay justified award in fees to the claimant's attorney for purposes of the appeal to the Court of Appeals. *Ellis v. Clayton Shoe Co.*, 267 Ark. 882, 595 S.W.2d 229 (Ct. App. 1979).

Where court of appeals remanded for a new determination as to wage loss disability in worker's compensation case, attorney's fees pursuant to subsection (b) were proper. *Belcher v. Holiday Inn*, 50 Ark. App. 148, 900 S.W.2d 215 (1995).

Attorney of a workers' compensation claimant who prevailed on appeal was not entitled to an attorney fee from the claimant's employer because the employer did not contest an administrative law judge's award to the claimant and was not a party to the Second Injury Fund's appeal before the Workers' Compensation Commission. *Firestone Tube Co. v. Potts*, 100 Ark. App. 203, 266 S.W.3d 223 (2007).

—Attorneys' fees.

This section does not permit an award of attorneys' fees against the Second Injury Fund. *Furman v. Second Injury Fund*, 336 Ark. 10, 983 S.W.2d 923 (1999).

Claims Not Controverted.

There was substantial evidence to support the commission's finding that the Second Injury Fund did not controvert employee's claim, so that no attorney's fees needed to be awarded pursuant to subdivision (a)(2)(A) of this section. *Lambert v. Baldor Elec.*, 44 Ark. App. 117, 868 S.W.2d 513 (1993).

Employer did not controvert employee's change-of-physician request where employee submitted a request for a change of physician only after employer refused to pay certain medical bills because they were not from the original treating physician; employee did not provide the name of the physician when requested to do so and employer was not responsible for knowing the name of the new doctor based on bills received prior to the submission of the request for change. *Jonesboro Human Dev. Ctr. v. Taylor*, 61 Ark. App. 42, 963 S.W.2d 617 (1998).

Compensation Due Other Persons.

Subdivision (a)(2)(B) does not authorize the commission to direct a carrier to withhold proportionate amounts due to medical providers for payment of the claimant's portion of the attorney's fee. *Holiday Inn-West v. Coleman*, 31 Ark. App. 224, 792 S.W.2d 345 (1990).

As used in subdivision (a)(2)(B), in the phrase "out of compensation payable to them," the word "them" refers to the claimant or his dependents; it cannot be read to include medical providers. *Holiday Inn-West v. Coleman*, 31 Ark. App. 224, 792 S.W.2d 345 (1990).

Controverted Claim.

Evidence sufficient to support commission's finding that claim was controverted and award of attorney's fee. *Littlejohn v. Earle Indus. Inc.*, 239 Ark. 439, 389 S.W.2d 898 (1965); *International Paper Co. v. Remley*, 256 Ark. 7, 505 S.W.2d 219 (1974); *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976); *Revere Copper & Brass, Inc. v. Talley*, 7 Ark. App. 234, 647 S.W.2d 477 (1983); *General Indus. v. Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987).

The employer's contention that the employee's healing period ended later than that claimed by the employee entitled the employee to an attorney's fee upon the sustaining of her position. *Pike County Poultry Co. v. Kelley*, 243 Ark. 460, 420 S.W.2d 523 (1967).

Fundamental purposes for making an employer liable for claimant's attorney fees when a claim is controverted are to discourage delay in recognition of liability, to deter arbitrary or capricious denial of claims, and to secure competent legal representation for indigent claimants. *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976).

Evidence insufficient to find that the carrier had controverted the claim and was therefore not liable for attorney fees or a penalty under § 11-9-802. *Turner v. Trade Winds Inn*, 267 Ark. 861, 592 S.W.2d 454 (Ct. App. 1979).

Evidence sufficient to find that case had not been controverted was justified and claimant was not entitled to controverted attorney's fee. *Climer v. Drake's Backhoe*, 7 Ark. App. 148, 644 S.W.2d 637 (1983); *Walter v. Southwestern Bell Tel. Co.*, 17 Ark. App. 43, 702 S.W.2d 822 (1986).

The question of whether a claim is controverted is one of fact to be determined from the circumstances of the particular case. *Climer v. Drake's Backhoe*, 7 Ark. App. 148, 644 S.W.2d 637 (1983); *Revere Copper & Brass, Inc. v. Talley*, 7 Ark. App. 234, 647 S.W.2d 477 (1983).

The mere failure of an employer to pay compensation benefits does not amount to controversion, in and of itself, especially where the carrier accepts the injury as compensable and is attempting to determine the extent of the disability. *Revere Copper & Brass, Inc. v. Talley*, 7 Ark. App. 234, 647 S.W.2d 477 (1983).

The Workers' Compensation Commission properly awarded a second maximum statutory attorney's fee which was calculated on some of the same controverted benefits as a prior lump-sum fee, where the same benefits had been controverted and placed in jeopardy twice by the employer and claimant had been required to obtain the services of an attorney on both occasions. *Tyson Foods, Inc. v. Fatherree*, 16 Ark. App. 41, 696 S.W.2d 782 (1985).

The question of whether a claim is controverted is one of fact to be determined from the circumstances of each particular case, and the Arkansas Workers' Compensation Commission's finding will not be disturbed if there is substantial evidence to support it. *Masonite Corp. v. Mitchell*, 16 Ark. App. 209, 699 S.W.2d 409 (1985).

The determination of whether a claim is controverted is a fact question to be resolved from the circumstances of the particular case; the mere failure of the employer to pay benefits does not, in and of itself, amount to controversion, especially when the carrier accepts the injury as compensable and is attempting to determine the extent of the disability. *Walter v. Southwestern Bell Tel. Co.*, 17 Ark. App. 43, 702 S.W.2d 822 (1986).

It was not significant for the award of attorneys' fees that medical bills were paid by a collateral source, where they were awarded to the claimant by the Workers' Compensation Commission after being controverted by the employer. The test for the award of attorneys' fees is that fees are calculated on the amount controverted and awarded. *General Indus. v. Gibson*, 22 Ark. App. 217, 738 S.W.2d 104 (1987).

Neither § 11-9-503 nor this section makes any provision for assessment of a

separate fee based on the amount of the penalty. The attorney's fee allowable should be computed on the amount of compensation controverted and awarded, increased by the safety-violation penalty. *Prier Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1988).

Direct proof of controversion is where the claimant must incur legal expenses to defend his disability benefits award on appeal. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

The appellate court remanded claimant's case to the commission for an award of attorney's fees where the entire claim was controverted. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997).

The claimant was entitled to an award of attorney's fees, notwithstanding the conclusion of the Workers' Compensation Commission that the employer, by prevailing on its request for a credit, was justified in not paying the claimant an attorney fee on his ten-percent permanent impairment rating because the credit exceeded its liability for payment of benefits, as the granting of the credit did not diminish the fact that the employer controverted and did not pay permanent disability benefits and that the claimant was, therefore, required to employ counsel. *Goodwin v. Phillips Petro. Co.*, 72 Ark. App. 302, 37 S.W.3d 644 (2001).

Where an employer controverts an injured employee's entitlement to certain benefits, but later accepts liability prior to a hearing on the merits, the employee's attorney may still request a hearing for an attorney's fee on those controverted benefits. *Wal-Mart Stores, Inc. v. Brown*, 73 Ark. App. 174, 40 S.W.3d 835 (2001).

Arkansas Workers' Compensation Commission did not err in finding that the Second Injury Fund controverted employee's benefits in excess of 25 percent under subdivision (a)(2)(B) of this section; the Fund claimed that the wage loss disability was not ripe and had listed for litigation the extent of employee's disability, and the record indicated that, if employee had not retained an attorney, he would not likely have been receiving any award for wage loss disability. *Lee v. Alcoa Extrusion, Inc.*, 89 Ark. App. 228, 201 S.W.3d 449 (2005).

Attorneys' fees were properly awarded in a workers' compensation case because an employer and its insurer took the po-

sition that employee was not entitled to a wage-loss benefit above an impairment rating, which amounted to a controversion of benefits owed. *Logan County v. McDonald*, 90 Ark. App. 409, 206 S.W.3d 258 (2005).

Arkansas Workers' Compensation Commission had substantial evidence before it to conclude that employer had not controverted employee's permanently totally disabled (PTD) status for purposes of awarding attorney fees because, when the employee had formally requested a hearing on several matters, the employer responded with a letter accepting that the employee was PTD. *Osborne v. Bekaert Corp.*, 97 Ark. App. 147, 245 S.W.3d 185 (2006).

Mere failure of an employer to pay certain benefits does not, in and of itself, amount to controversion, especially when the carrier accepts the injury as compensable and is attempting to determine the extent of the disability. *Osborne v. Bekaert Corp.*, 97 Ark. App. 147, 245 S.W.3d 185 (2006).

Entitlement.

Doctor who was represented by his counsel in claim for compensation for services rendered was entitled to an attorney's fee in a sum determined by the Workers' Compensation Commission, inasmuch as a fee would have been recoverable if the doctor's claim had been represented by claimant's attorney. *Hulvey v. Kellwood Co.*, 262 Ark. 564, 559 S.W.2d 153 (1977).

Where there was no final order in the case, but claimant prevailed because the appeal was dismissed, attorney's fees were awarded under this section. *Gina Marie Farms v. Jones*, 28 Ark. App. 90, 770 S.W.2d 680 (1989).

The allowance or disallowance of an attorney's fee does not hinge on whether the medical bills were paid by a collateral source. *Varnell v. Union Carbide*, 29 Ark. App. 185, 779 S.W.2d 542 (1989).

Attorney that had been retained by an employee to represent the employee in a workers' compensation case, but then had been told by the employee that he wanted to end the case, was entitled to assert a lien on a final settlement that was reached after the employee hired a second lawyer instead of abandoning the case; the fact that the attorney had been in-

volved in the case before there was any controversy did not preclude the attorney from imposing a lien for fees. *Wren v. DeQueen Sand & Gravel Co.*, 87 Ark. App. 212, 189 S.W.3d 522 (2004).

Arkansas Workers' Compensation Commission properly denied employee's request for attorney's fees under subdivision (a)(4) of this section; in the absence of a contract between employee's medical providers and his attorney, the attorney was not entitled to attorney's fees based upon the value of medical services provided to him. *Teasley v. Hermann Cos.*, 92 Ark. App. 40, 211 S.W.3d 40 (2005).

Finding in favor of the employee in a workers' compensation action was appropriate under subdivision (a)(2)(B) of this section because the Workers' Compensation Commission had substantial evidence before it to conclude that the employer and carrier had controverted the employee's entitlement to benefits for purposes of awarding an attorney fee. It was undisputed that the rating report from the doctor was dated April 1, 2005, but that the carrier did not issue a check for the employee's permanent-partial-disability benefits until June 8, 2005. *Southeast Ark. Human Dev. Ctr. v. Courtney*, 99 Ark. App. 87, 257 S.W.3d 554 (2007).

Substantial evidence supported the finding that the employee did not prevail on appeal to the full Arkansas Workers' Compensation Commission, because it was the employee who appealed to the full Commission, which affirmed and adopted the opinion of the administrative law judge. *Taggart v. Mid Am. Packaging*, 2009 Ark. App. 335, 308 S.W.3d 643 (2009).

Where an employee proved entitlement to TTD benefits and wage-loss disability benefits, and because the employee prevailed on appeal to the Arkansas Workers' Compensation Commission, the employee was entitled to attorney fees, as awarded by the Commission pursuant to subsections (a) and (b) of this section. *Tyson Poultry, Inc. v. Narvaiz*, 2012 Ark. 118, — S.W.3d — (2012).

Exhaustion of Remedies.

An attorney seeking fees for a workers' compensation suit to be based on a percentage of the medical payments made by an employer and his insurer, even though the full amount of payments is not yet

known, cannot obtain a declaratory judgment if he has not exhausted his administrative remedies. *Ragon v. Great Am. Indem. Co.*, 224 Ark. 387, 273 S.W.2d 524 (1954).

Lump Sum.

Where the only compensation awarded to a claimant is weekly benefits, the Workers' Compensation Commission had no statutory authority to direct that an attorney's fee be paid on the basis of a lump-sum award, and since the award and assessment of an attorney's fee against the employer or carrier is purely statutory, the commission erred in awarding a lump-sum fee. *United States Fid. & Guar. Co. v. Potter*, 263 Ark. 689, 567 S.W.2d 104 (1978).

The Workers' Compensation Commission improperly awarded a claimant's attorney an additional attorney's fee under this section when he filed an action seeking a lump-sum attorney's fee instead of the weekly fee he had been awarded by the administrative law judge, since this section provides for the additional fee only if the claimant prevails on appeal and, considering the nature of the relief sought in this action, it was the claimant's attorney alone who benefitted from the appeal. *Aluminum Co. of America v. Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982).

The legislature intended § 11-9-716 and this section to be read in conjunction with one another and saw no conflict be-

tween the two statutes; the legislature felt strongly that the commission should be able to award lump-sum attorneys' fees. *International Paper Co. v. McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984).

It was the intention of the legislature to enable the Workers' Compensation Commission to approve the lump-sum payment of attorney's fees chargeable to the employer while providing for installment payments of the portion of the attorney's fee chargeable to the injured employee or the injured employee's dependents; in such a situation the portion of the fee to be paid in installments by the injured employee or the injured employee's dependents should not be discounted since it is not being received by the attorney in a lump sum. *Seward v. Bud Avants Co.*, 65 Ark. App. 88, 985 S.W.2d 332 (1999).

Cited: *Empire Life & Hosp. Ins. Co. v. Armored Planting Co.*, 247 Ark. 994, 449 S.W.2d 200 (1970); *Faldon Indus. Wiring Co. v. Downs*, 255 Ark. 923, 504 S.W.2d 346 (1974); *Meadors Lumber Co. v. Wysong*, 262 Ark. 425, 557 S.W.2d 395 (1977); *Horseshoe Bend Bldrs. v. Sosa*, 259 Ark. 267, 532 S.W.2d 182 (1976); *Travelers Ins. Co. v. Martin*, 264 Ark. 266, 571 S.W.2d 416 (1978); *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Henderson v. Winchester*, 268 Ark. 710, 594 S.W.2d 866 (Ct. App. 1980); *Vittitow v. Central Maloney*, 69 Ark. App. 176, 11 S.W.3d 12 (2000).

11-9-716. Lump-sum attorney's fees.

(a) The Workers' Compensation Commission is authorized to approve lump-sum attorney's fees for legal services rendered in respect of a claim before the commission.

(b) The lump-sum attorney's fees are allowable notwithstanding that the award of compensation to the injured employee is to be paid on an installment basis.

(c) Lump-sum attorney's fees, if approved by the commission, shall be discounted at the rate provided in § 11-9-804, as that provision may be amended from time to time.

History. Acts 1979, No. 215, § 1; 1981, No. 631, § 4; A.S.A. 1947, § 81-1332.1.

A.C.R.C. Notes. References to "this

subchapter" in §§ 11-9-701 — 11-9-715 may not apply to this section, which was enacted subsequently.

CASE NOTES

ANALYSIS

Construction.

Purpose.

Applicability.

Ascertainable Award.

Construction.

This section and § 11-9-715 were intended to be read together as the legislature felt strongly that the commission should be able to award lump-sum attorneys' fees. *International Paper Co. v. McBride*, 12 Ark. App. 400, 678 S.W.2d 375 (1984).

Language of the statute is not limited to employers; it does not mention employers or any other respondent by name. The statute includes attorney fees owed by the Arkansas Second Injury Fund. *Lewis v. Auto Parts & Tire Co.*, 104 Ark. App. 230, 290 S.W.3d 37 (2008), rehearing denied, *Lewis v. Second Injury Fund*, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 722 (Feb. 4, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 461 (Apr. 30, 2009).

Purpose.

The General Assembly enacted this section to remedy the problem of attorneys failing to receive full payment for their services to a workers' compensation claimant or beneficiary, where the attorney received his compensation installments on the same schedule that benefits were paid to the recipient but where the claimant or beneficiary died or remarried prior to the attorney's receipt of the total fees awarded to him. *Aluminum Co. of America v. Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982).

Applicability.

The commission was correct in its decision that this section retroactively applied to attorney's fees earned and awarded prior to March 1, 1979; therefore the commission could order that the defendant

employer pay the claimant's attorney a lump sum equal to the total value of the weekly payments which were awarded prior to March 1, 1979. *Aluminum Co. of America v. Neal*, 4 Ark. App. 11, 626 S.W.2d 620 (1982).

Arkansas Workers' Compensation Commission erred in holding that a claimant's attorney was not entitled to a lump-sum attorney fee to be paid by the Arkansas Second Injury Fund because the Commission's opinion was based on the false conclusion that the amount of the attorney fee was "unascertainable" because the amount of payments to the claimant were unascertainable; under the statute, the claimant's attorney was entitled to a lump-sum fee. *Lewis v. Auto Parts & Tire Co.*, 104 Ark. App. 230, 290 S.W.3d 37 (2008), rehearing denied, *Lewis v. Second Injury Fund*, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 722 (Feb. 4, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 461 (Apr. 30, 2009).

As a lump-sum payment of an employee's one-half portion of the attorney's fee by the Death and Permanent Disability Fund under this section would force the Fund to assume the risk of overpayment, the Arkansas Workers' Compensation Commission did not abuse its discretion in denying that request. *O'Hara v. J. Christy Constr. Co.*, 2012 Ark. App. 89, — S.W.3d — (2012).

Ascertainable Award.

The Workers' Compensation Commission properly concluded that a lump-sum attorney's fee could not be awarded on a claimant's current total disability award where the award was not ascertainable because it was not permanent; therefore, it was impossible to calculate the award. *Pitts v. Western Elec.*, 15 Ark. App. 85, 689 S.W.2d 582 (1985).

Cited: *Vittitow v. Central Maloney*, 69 Ark. App. 176, 11 S.W.3d 12 (2000).

11-9-717. Attorney's signature.

(a)(1)(A) Every claim, request for benefits, request for additional benefits, controversion of benefits, request for a hearing, pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one (1) attorney of record in his or her individual name, whose address shall be stated.

(B) A party who is not represented by an attorney shall sign his or her claim, request for benefits, request for additional benefits, controversion of benefits, request for a hearing, pleading, motion, or other paper, and state his or her address.

(2) The signature of an attorney or party constitutes a certificate by him or her that:

(A) He or she has read the claim, request for benefits, request for additional benefits, controversion of benefits, request for a hearing, pleading, motion, or other paper;

(B) To the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and

(C) It is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(3) If a claim, request for benefits, request for additional benefits, controversion of benefits, request for a hearing, pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

(4) If a claim, request for benefits, request for additional benefits, controversion of benefits, request for a hearing, pleading, motion, or other paper is signed in violation of this rule, the Workers' Compensation Commission, including administrative law judges, upon motion or upon their own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of a claim, request for benefits, request for additional benefits, controversion of benefits, request for a hearing, pleading, motion, or other paper, including a reasonable attorney's fee.

(b) Appropriate sanctions, including the amount of reasonable expenses and attorney's fees, may also be imposed against a party or its attorney which, without good cause shown, fails to appear for a hearing, deposition, or any other matter scheduled by the commission or administrative law judge, or frivolously joins another party.

History. Acts 1993, No. 796, § 36.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by

this act, which originated as House Bill 2646 of 2001."

References to "this subchapter" in §§ 11-9-701 — 11-9-715 may not apply to this section, which was enacted subsequently.

CASE NOTES

Sanctions.

Costs were properly imposed against appellant's attorney where the employee was receiving or had received all the benefits to which he was entitled and attorney

refiled the claim; appellant's attorney filed a non-meritorious claim that was not grounded in fact. *Johnson v. Triple T Foods*, 55 Ark. App. 83, 929 S.W.2d 730 (1996).

SUBCHAPTER 8 — PAYMENT

SECTION.

- 11-9-801. Methods of payment.
- 11-9-802. Installments.
- 11-9-803. Controversion of right to compensation.
- 11-9-804. Lump-sum settlement.
- 11-9-805. Joint petition for final settlement.
- 11-9-806. Disputed source of benefits.
- 11-9-807. Credit for compensation or wages paid.

SECTION.

- 11-9-808. Deposit or bond to secure payment.
- 11-9-809. Interest.
- 11-9-810. Notice of payment.
- 11-9-811. Investigations.
- 11-9-812. Incarceration of injured employee.
- 11-9-813. Deductibles.

Effective Dates. Acts 1959, No. 167, § 2: approved Mar. 4, 1959. Emergency clause provided: "It is hereby found and declared by the General Assembly of the State of Arkansas that claimants in workmen's compensation cases are being denied interests on workmen's compensation awards and that such denial is contrary to the public interest. This act being necessary for the preservation of the public health, peace and happiness for the people of the State of Arkansas, an emergency is hereby declared and this act shall be in full force and effect from and after its passage."

Acts 1979, No. 253, § 12: Mar. 2, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that certain provisions of the Worker's Compensation law are in urgent need of revision to more clearly define the benefits to be provided by Worker's Compensation coverage; that this Act is designed to provide such clarification and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1981, No. 290, § 17: Mar. 3, 1981. Emergency clause provided: "It is hereby

found and determined by the General Assembly that there is urgent need to clarify the provisions of the Arkansas Workers' Compensation law and to provide improved benefits for persons qualifying under that Act; that this Act is designed to provide such clarification and improved benefits and should be given effect at the earliest possible date. Therefore an emergency is hereby declared to exist and this Act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1986 (2nd Ex. Sess.), No. 10, § 15: July 1, 1986. Emergency clause provided: "It is hereby found and determined by the General Assembly that the increased benefits and improvements in the administration of the Workers' Compensation system in Arkansas is in the best interest of employees, employers, the public in general; therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1986."

Acts 1993, No. 796, § 41: July 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Workers' Compensation Law is in immediate need of substantial

revision; that this act accomplishes immediate revision; and that this act shall go into effect as soon as is practical which is determined to be July 1, 1993; and that unless this emergency clause is adopted, this act will not go into effect until after July 1, 1993. Therefore, an emergency is

hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1993. Furthermore, the provisions of this act shall apply only to injuries which occur after July 1, 1993."

RESEARCH REFERENCES

ALR. Tort liability of worker's compensation insurer for wrongful delay or refusal to make payments due. 8 A.L.R.4th 902.

Am. Jur. 82 Am. Jur. 2d, Work. Comp., § 674 et seq.

Ark. L. Rev. Copeland, The New Arkansas Workers' Compensation Act: Did the Pendulum Swing Too Far?, 47 Ark. L. Rev. 1.

U. Ark. Little Rock L.J. Karber, Survey of Arkansas Law: Workers' Compensation, 2 U. Ark. Little Rock L.J. 294.

Powell, Survey of Worker's Compensation Law, 3 U. Ark. Little Rock L.J. 329.

Survey of Arkansas Law: Worker's Compensation, 4 U. Ark. Little Rock L.J. 255.

Survey of Arkansas Law, Workers' Compensation, 5 U. Ark. Little Rock L.J. 197.

Arkansas Law Survey, Dobson, Workers' Compensation, 8 U. Ark. Little Rock L.J. 225.

C.J.S. 100 C.J.S., Work. Comp., § 624 et seq.

101 C.J.S., Work. Comp., § 1452 et seq.

CASE NOTES

ANALYSIS

Construction.
Apportionment.
Exclusive Remedy.
Settlement.

Construction.

In view of beneficent purpose of the workers' compensation program, this subchapter must be construed liberally in favor of the claimant and all doubtful cases resolved in claimant's favor. *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976).

Apportionment.

Where commission found that the responsibility of two carriers should be apportioned on a 75 percent to 25 percent basis in awarding permanent total disability, commission's action in directing one carrier to compensate other carrier for its pro rata share of the total permanent partial disability previously paid was not error since otherwise one carrier would get a free ride at the expense of the other for the permanent partial payments already made to claimant. *Browning's Restaurant v. Kuykendall*, 263 Ark. 374, 565 S.W.2d 33 (1978).

Exclusive Remedy.

The rights and remedies provided in this chapter for an employee injured in the course of his employment are exclusive of all other rights and remedies; therefore, the circuit court did not err in dismissing a complaint filed by a workers' compensation recipient against the workers' compensation insurer seeking damages for insurer's delay in payment of worker's compensation benefits. *Johnson v. Houston Gen. Ins. Co.*, 259 Ark. 724, 536 S.W.2d 121 (1976).

The benefits payable pursuant to the Workers' Compensation Act and the procedure set out in that act for obtaining those benefits constitute an exclusive remedy, and that remedy precludes an action at law, even for an intentional tort arising out of the nonpayment of benefits, where the statutory remedies for late payment include: (1) a twenty percent penalty plus interest for the late payment of an award, (2) a provision by which the Workers' Compensation Commission may require a bond from an employer to insure payment, and (3) a provision that a final award may be filed with the circuit clerk which causes it to become a lien on the property of the employer. *Cain v. National Union Life Ins. Co.*, 290 Ark. 240, 718 S.W.2d 444 (1986).

Settlement.

Although in uncontroverted claims it is the custom for insurance companies to have a physician rate the claimant for disability and settle on that basis, the insurance company takes this course at its own risk and the settlement is subject to attack. *Dixie Cup Co. v. O'Neal*, 240 Ark. 785, 402 S.W.2d 417 (1966).

Cited: *Dockery v. Thomas*, 229 Ark. 984, 320 S.W.2d 257 (1959); *Ward Furn. Mfg. Co. v. Reather*, 234 Ark. 151, 350 S.W.2d 691 (1961); *Bryan v. Ford, Bacon & Davis*, 246 Ark. 327, 438 S.W.2d 472 (1969); *Hartford Ins. Group v. Carter*, 251 Ark. 680, 473 S.W.2d 918 (1971); *Tri State Ins. Co. v. Employers Mut. Liab. Ins. Co.*,

254 Ark. 944, 497 S.W.2d 39 (1973); *Faldon Indus. Wiring Co. v. Downs*, 255 Ark. 923, 504 S.W.2d 346 (1974); *Gill v. Ozark Forest Prods., Inc.*, 255 Ark. 951, 504 S.W.2d 357 (1974); *Aluminum Co. of America v. McClendon*, 259 Ark. 675, 535 S.W.2d 832 (1976); *Arkansas State Hwy. & Transp. Dep't v. Godwin*, 270 Ark. 743, 606 S.W.2d 127 (1980); *Hill v. CGR Medical Corp.*, 9 Ark. App. 334, 660 S.W.2d 171 (1983); *Hill v. CGR Medical Corp.*, 282 Ark. 35, 665 S.W.2d 274 (Ark. 1984); *Tyson Foods, Inc. v. Fatherree*, 16 Ark. App. 41, 696 S.W.2d 782 (1985); *Universal Underwriters Ins. Co. v. Bussey*, 17 Ark. App. 47, 703 S.W.2d 459 (1986).

11-9-801. Methods of payment.

(a) Compensation shall be paid by check, by electronic funds transfer, or by state warrant.

(b) Payment shall be made payable to the order of the person entitled to the compensation and paid directly to the person entitled to the compensation.

(c) If the compensation beneficiary is a mental incompetent or a minor of tender years or immature judgment, the Workers' Compensation Commission, in the exercise of its discretion, may direct that payment shall be made to a legally appointed guardian of the estate of the incompetent or minor.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1959, No. 167, § 1; 1979, No. 253, § 6; 1981, No. 290,

§§ 7-9; 1983, No. 720, § 1; A.S.A. 1947, § 81-1319; Acts 2009, No. 726, § 3.

CASE NOTES**Statute of Limitations.**

Under § 11-9-702(f)(2), the legislature intended to protect minors, residing with a natural parent who failed to pursue a claim on their behalf, by permitting them to file a claim after age eighteen; under § 11-9-702(f)(2) and this section, the legislature contemplated court action for the appointment of a guardian and the Arkansas Workers' Compensation Commission

properly allowed the decedent's son's claim for dependent-death benefits pursuant to § 11-9-702(f)(2). *Hicks v. Bates*, 104 Ark. App. 348, 292 S.W.3d 850 (2009), rehearing denied, — Ark. App. —, — S.W.3d —, 2009 Ark. App. LEXIS 717 (Mar. 18, 2009), review denied, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 487 (June 4, 2009).

11-9-802. Installments.

(a) The first installment of compensation shall become due on the fifteenth day after the employer has notice of the injury or death, as provided in § 11-9-701, on which date all compensation then accrued

shall be paid. Thereafter, compensation shall be paid every two (2) weeks except where the Workers' Compensation Commission directs that installment payments be made at other periods.

(b) If any installment of compensation payable without an award is not paid within fifteen (15) days after it becomes due, as provided in subsection (a) of this section, there shall be added to the unpaid installment an amount equal to eighteen percent (18%) thereof, which shall be paid at the same time as, but in addition to, the installment unless notice of controversion is filed or an extension is granted the employer under § 11-9-803 or unless such nonpayment is excused by the commission after a showing by the employer that, owing to conditions over which he or she had no control, the installment could not be paid within the period prescribed.

(c) If any installment payable under the terms of an award is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§ 11-9-711 and 11-9-712.

(d) Medical bills are payable within thirty (30) days after receipt by the respondent unless disputed as to compensability or amount.

(e) In the event that the commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%), payable to the claimant.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1959, No. 167, § 1; 1981, No. 290, § 8; 1986 (2nd Ex. Sess.), No. 10, § 9; A.S.A. 1947, § 81-1319; Acts 1993, No. 796, § 37.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act,

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

ANALYSIS

Constitutionality.

Construction.

Applicability.

Insurer's Refusal to Pay.

Payable Under Award.

Payable Without Award.

Constitutionality.

Employers did not present the appellate court with any convincing argument regarding how or why the cases they cited were applicable in deciding whether subsection (c) of this section violated their rights under the Arkansas Constitution, Ark. Const. Art. II, §§ 8 or 9, and did not develop their argument with citation to

any case law addressing anything approaching the constitutionality of late-payment schemes analogous to subsection (c). *Owens Planting Co. v. Graham*, 2011 Ark. App. 444, — S.W.3d — (2011).

Construction.

The term "installment" for purposes of subsection (c) includes compensation, and includes interest awarded on compensation benefits. *Couch v. First State Bank*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Applicability.

The penalty provisions of this section do not apply with respect to the late payment of medical bills and legal expenses since the penalty provisions only apply to installment payments of compensation.

Model Laundry & Dry Cleaning v. Simmons, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Johnson v. American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992).

Subsection (b) applies only to the failure to pay benefits that are due and not controverted. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997), *supp. op.*, *Clark v. Director, Empl. Sec. Dep't*, 58 Ark. App. 1, 944 S.W.2d 862.

Substantial evidence supported the Arkansas Workers' Compensation Commission's disposition of a contempt issue by not requiring the imposition of a 36 percent penalty where appellees' had acknowledged that the illness of an adjuster was affecting the processing of claims and steps were taken to address the delays. *Bingle v. Quality Inn*, 96 Ark. App. 312, 241 S.W.3d 271 (2006).

Arkansas Workers' Compensation Commission did not err in finding that no penalty was due from an employer and its insurer pursuant to subsection (c) of this section where the order entered by the Commission awarding permanent total disability benefits to an employee was the award contemplated by the statute. *O'Hara v. J. Christy Constr. Co.*, 101 Ark. App. 212, 272 S.W.3d 842 (2008), rehearing denied, — Ark. App. —, 272 S.W.3d 842 (2008), rehearing denied, — Ark. App. —, — S.W.3d —, 2008 Ark. App. LEXIS 324 (Apr. 16, 2008).

Employer did not violate previous orders of the Arkansas Workers' Compensation Commission when it failed to pay for surgery recommended by a different doctor because the employer was entitled to challenge the reasonableness of the new treatment and substantial evidence supported the Commission's determination that the suggested surgery was not reasonable and necessary. *Crawford v. Superior Indus. & Crockett Adjustment, Inc.*, 2009 Ark. App. 738, — S.W.3d — (2009).

Insurer's Refusal to Pay.

An injured employee cannot sue the workers' compensation insurer for an intentional tort when that insurer declines to pay certain medical expenses; his exclusive remedy is under the Workers' Compensation Act. *Liberty Mut. Ins. Co. v. Coleman*, 313 Ark. 212, 852 S.W.2d 816 (1993).

Penalty assessed against employer and insurance carrier who acted egregiously in

refusing to pay rightfully due benefits on time. *Milligan v. West Tree Serv.*, 57 Ark. App. 14, 946 S.W.2d 697 (1997).

Payable Under Award.

Subsection (c) applies only where award has been made; it is inapplicable to payment within 30 days of award made years after the original accident. *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961).

Where employer and its compensation carrier withheld money from the amount due employee under the commission's award, the imposition of a 20 percent penalty on the entire amount of the award was proper. *Mohawk Tire & Rubber Co. v. Brider*, 259 Ark. 728, 536 S.W.2d 126 (1976).

The penalty provision of subsection (c) applies only to disability benefits and has no application to claimant's medical bills. *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980).

Administrative law judge erred in ordering the carrier to pay a 20 percent penalty under subsection (c) of this section on the unpaid medical expenses, since the carrier being asked to pay a substantial amount of medical expenses was entitled to a hearing and determination of the issue of reasonableness and necessity without being assessed a 20 percent penalty. *Frank J. Rooney, Inc. v. Pitts*, 268 Ark. 911, 597 S.W.2d 120 (Ct. App. 1980).

To assess a 20 percent penalty on the benefits allowed by the award for employer's delay of payment. *Smith's Store v. Kirker*, 6 Ark. App. 222, 639 S.W.2d 751 (1982).

The penalty allowed by subsection (c) of this section does not apply to medical bills and attorney fees. *Smith's Store v. Kirker*, 6 Ark. App. 222, 639 S.W.2d 751 (1982).

Where the compensation commission held that the penalty provided in subsection (c) did not attach until 15 days after the time for filing an appeal had expired, it correctly reconciled subsection (c) and § 11-9-711(a)(1). *Johnson v. American Pulpwood Co.*, 38 Ark. App. 6, 826 S.W.2d 827 (1992).

Failure to begin paying benefits within the statutory period gives rise to the twenty-percent penalty laid out in this section. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

Twenty-percent penalty and award of a second attorney's fee for controversion

was properly assessed against defendants where the commission clearly awarded temporary total disability benefits to the claimant at the rate of \$241.93 per week from June 8, 1992, to a date yet to be determined, and defendants were ordered to comply with the award made by the administrative law judge which the commission adopted and affirmed in its April 2, 1993, decision and defendants took no appeal and where defendants had paid none of the temporary total disability benefits that were awarded more than two years prior to the appeal. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

Payable Without Award.

The penalty provision of subsection (b) applies only to disability benefits and has

no application to medical bills. *Turner v. Trade Winds Inn*, 267 Ark. 861, 592 S.W.2d 454 (Ct. App. 1979).

Evidence sufficient to find that employer not liable for penalty under subsection (b). *Turner v. Trade Winds Inn*, 267 Ark. 861, 592 S.W.2d 454 (Ct. App. 1979).

Subsection (b) applies only to installments payable without an award. *Es-kridge v. Goldman & Co.*, 268 Ark. 967, 598 S.W.2d 425 (Ct. App. 1980).

Cited: *Robinson v. Ed Williams Constr. Co.*, 38 Ark. App. 90, 828 S.W.2d 860 (1992); *Travelers Ins. Co. v. Smith*, 329 Ark. 336, 947 S.W.2d 382 (1997); *Castleberry v. Elite Lamp Co.*, 69 Ark. App. 359, 13 S.W.3d 211 (2000); *Cooper Std. Auto., Inc. v. Kelley*, 2009 Ark. App. 552, — S.W.3d — (2009).

11-9-803. Controversion of right to compensation.

(a)(1) Each employer desiring to controvert the right to compensation shall file with the Workers' Compensation Commission on or before the fifteenth day following notice of the alleged injury or death a statement on a form prescribed by the commission that the right to compensation is controverted and the grounds therefor, the names of the claimant, employer, and carrier, if any, and the date and place of the alleged injury or death.

(2) Failure to file the statement of controversion shall not preclude the urging of any defense to the claim subsequently filed, nor shall the filing of a statement of controversion preclude the urging of additional defenses to those contained in the statement of controversion.

(b)(1) If an employer is unable to obtain sufficient medical information as to the alleged injury or death within fifteen (15) days following receipt of notice, although the employer has acted in good faith and with all due diligence, the employer may apply in writing for an extension of time for making payment of the first installment or controverting the claim.

(2) This written application is to be postmarked within the fifteen-day period.

(3) The commission may, in its discretion, grant the extension and fix the additional time to be allowed.

(4) Filing of application for an extension shall not be deemed to be a controversion of the claim.

(c) The provision in subsection (b) of this section shall not apply in cases where the physician is an employee of, on retainer with, or has a written contract to provide medical services for the employer.

History. Init. Meas. 1948, No. 4, § 19, § 1; 1981, No. 290, § 7; A.S.A. 1947, § 81-Acts 1949, p. 1420; Acts 1959, No. 167, 1319.

CASE NOTES

ANALYSIS

Controversion Per Se.

Evidence.

Extent of Injury.

Controversion Per Se.

Dilatory payments of compensation do not amount to a controversion per se. *Horseshoe Bend Bldrs. v. Sosa*, 259 Ark. 267, 532 S.W.2d 182 (1976).

The mere fact that payment of benefits is delayed does not amount to controversion per se. *Ridgeway Pulpwood v. Baker*, 7 Ark. App. 214, 646 S.W.2d 711 (1983).

Evidence.

Evidence insufficient to find that claim was controverted. *Horseshoe Bend Bldrs. v. Sosa*, 259 Ark. 267, 532 S.W.2d 182 (1976); *Turner v. Trade Winds Inn*, 267 Ark. 861, 592 S.W.2d 454 (Ct. App. 1979).

Whether a claim is controverted is a factual question to be determined by the commission from the circumstances of the particular case, and the commission's findings should not be reversed unless it is clear that there has been a gross abuse of discretion. *Aluminum Co. of America v. Henning*, 260 Ark. 699, 543 S.W.2d 480 (1976).

Evidence sufficient to find that claim was controverted. *Model Laundry & Dry Cleaning v. Simmons*, 268 Ark. 770, 596 S.W.2d 337 (Ct. App. 1980); *Hart's Exxon Serv. Station v. Prater*, 268 Ark. 961, 597 S.W.2d 130 (Ct. App. 1980); *Ridgeway Pulpwood v. Baker*, 7 Ark. App. 214, 646 S.W.2d 711 (1983); *Irons v. Minton*, 10 Ark. App. 38, 661 S.W.2d 408 (1983).

Where at the time of the hearing before the commission the claimant had not selected or elected to pursue a rehabilitation program, there was no error on the part of the commission in limiting its finding as to controversion of benefits to the finding that the employer has controverted payment of permanent partial disability benefits in excess of five percent to the body as a whole. *Weeks v. Coca Cola Bottling Co.*, 270 Ark. 151, 604 S.W.2d 566 (1980).

A determination of whether a claim had been controverted may be a question of fact and is not to be determined mechanically upon ascertaining whether, when the employee has filed his claim, the employer promptly responds by accepting or controverting the claim; there are other factors which the commission may consider in determining whether the services of the attorney were necessitated by the employer's action. *Ridgeway Pulpwood v. Baker*, 7 Ark. App. 214, 646 S.W.2d 711 (1983).

The determination whether a claim was controverted is a question of fact for the commission and the commission's decision on controversion will not be disturbed if it is supported by substantial evidence. *Irons v. Minton*, 10 Ark. App. 38, 661 S.W.2d 408 (1983).

Extent of Injury.

The mere failure of an employer to pay compensation benefits does not amount to controversion, and this is especially true when the carrier accepts the injury as compensable and is attempting to determine the extent of disability. *Turner v. Trade Winds Inn*, 267 Ark. 861, 592 S.W.2d 454 (Ct. App. 1979).

11-9-804. Lump-sum settlement.

(a)(1) Whenever the Workers' Compensation Commission determines that it is for the best interest of the parties entitled to compensation, and after due notice to all parties in interest of a hearing, the liability of the employer for compensation may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at ten percent (10%) discount, compounded annually.

(2) Lump-sum settlements shall not be allowed if the employer presents evidence which proves by a preponderance of the evidence that ordering the compensation discharged in such a manner would result in

a substantial adverse effect on the continuing economic viability of the employer.

(b)(1) The probability of the death of the injured employee or other persons entitled to compensation before the expiration of the period during which they are entitled to compensation shall, in the absence of special circumstances making such a course improper, be determined in accordance with the following table.

(2) It is intended that this table shall be used in conjunction with the discount rate prescribed in subsection (a)(1) of this section for the purpose of calculating the present value of lump-sum settlements to injured employees.

Age Years	Average Remaining Lifetime Years
1	74.97
2	75.37
3	74.47
4	73.54
5	72.59
6	71.63
7	70.67
8	69.70
9	68.73
10	67.75
11	66.77
12	65.80
13	64.82
14	63.84
15	62.87
16	61.90
17	60.94
18	59.97
19	59.02
20	58.06
21	57.10
22	56.15
23	55.19
24	54.24
25	53.29
26	52.33
27	51.38
28	50.42
29	49.47

Age Years	Average Remaining Lifetime Years
30	48.52
31	47.57
32	46.62
33	45.68
34	44.73
35	43.79
36	42.86
37	41.92
38	40.66
39	40.07
40	39.14
41	38.23
42	37.31
43	36.41
44	35.50
45	34.60
46	33.71
47	32.83
48	31.95
49	31.08
50	30.21
51	29.35
52	28.49
53	27.65
54	26.80
55	25.97
56	25.14
57	24.31
58	23.49
59	22.68
60	21.88
61	21.09
62	20.30
63	19.53
64	18.76
65	18.00
66	17.25
67	16.51
68	15.78

Age Years	Average Remaining Lifetime Years
69	15.06
70	14.35
71	13.67
72	13.01
73	12.38
74	11.77
75	11.18
76	10.61
77	10.04
78	9.48
79	8.93
80	8.40
81	7.90
82	7.42
83	6.98
84	6.57
85	6.17
86	5.80
87	5.43
88	5.09
89	4.77
90	4.47
91	4.18
92	3.92
93	3.69
94	3.50
95	3.33
96	3.18
97	3.06
98	2.95
99	2.85
100	2.77

(c) The probability of the happening of any other contingency affecting the amount or duration of compensation shall be disregarded, except the possibility of the remarriage of the widow, which shall be determined in accordance with the Danish Annuity and Dutch Remarriage Table.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1959, No. 167, § 1; 1979, No. 253, § 6; 1986 (2nd Ex. Sess.), No. 10, § 9; A.S.A. 1947, § 81-1319; Acts 1989, No. 460, § 1.

CASE NOTES

ANALYSIS

Attorney's Fee.
Commission's Discretion.
Deviation from Table.
Employer Liability.
Future Claims.
Future Payments.

Attorney's Fee.

Where the only compensation awarded to a claimant is weekly benefits, the Workers' Compensation Commission had no statutory authority to direct that an attorney's fee be paid on the basis of a lump sum award, and since the award and assessment of an attorney's fee against the employer or carrier is purely statutory, the commission erred in awarding a lump-sum fee. *United States Fid. & Guar. Co. v. Potter*, 263 Ark. 689, 567 S.W.2d 104 (1978).

The Workers' Compensation Commission properly concluded that a lump sum attorney's fee could not be awarded on a claimant's current total disability award where the award was not ascertainable because it was not permanent; therefore, it was impossible to calculate the award. *Pitts v. Western Elec.*, 15 Ark. App. 85, 689 S.W.2d 582 (1985).

Commission's Discretion.

Commission did not abuse its discretion in denying a lump sum award where the widow was only twenty-one and the minor children were of tender years. *Gary McJunkin Trucking Co. v. Byars*, 258 Ark. 387, 525 S.W.2d 662 (1975).

Deviation from Table.

Where administrative law judge found that special circumstances existed that required him to deviate from the American Experience Table of Mortality, the judge was required to make an independent assessment of claimant's probable life span; clearly, the actual life span is the best evidence that could be acquired on this issue. *Quinn v. Webb Wheel Prods.*, 52 Ark. App. 208, 915 S.W.2d 740 (1996).

Employer Liability.

A lump-sum settlement does not discharge the employer from liability for payment of compensation not susceptible of determination and not contemplated nor included in the lump-sum settlement. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Future Claims.

Lump sum settlements for the full amounts payable for permanent total disability did not preclude future claims for additional medical benefits accruing subsequent to the lump sum award. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

Future Payments.

Where claimant was awarded compensation for permanent partial disability and received a lump sum equal to all payments which had already accrued, claimant wrongly contended the payments ran from the date of award, since the deduction permitted under this section when future payments are discharged by a single total payment had not been claimed. *Phillips v. Bray*, 234 Ark. 190, 351 S.W.2d 147 (1961).

11-9-805. Joint petition for final settlement.

(a) Upon petition filed by the employer or carrier and the injured employee requesting that a final settlement be had between the parties, the Workers' Compensation Commission shall hear the petition and take testimony and make investigations as may be necessary to determine whether a final settlement should be had.

(b)(1) If the commission decides it is for the best interests of the claimant that a final award be made, it may order an award that shall be final as to the rights of all parties to the petition.

(2) Thereafter, the commission shall not have jurisdiction over any claim for the same injury or any results arising from it.

(c) If an employee has returned to work or agreed to return to work, the commission shall not approve a joint petition which has allotted moneys for vocational rehabilitation or any indemnity benefits in excess of that payable as an anatomical impairment as established by objective and measurable findings.

(d) If the commission denies the petition, the denial shall be without prejudice to either party.

(e) No appeal shall lie from an order or award denying a joint petition.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1959, No. 167, § 1; A.S.A. 1947, § 81-1319; Acts 1993, No. 796, § 33.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act,

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

CASE NOTES

ANALYSIS

Purpose.
Employer Liability.
General Release.
Jurisdiction.
Modifications.
Petition to Set Aside.
Remand.
Second Joint Petition.
Settlement.
Third-party Tortfeasor.

Purpose.

One avowed and worthwhile objective of subsection (a) of this section is to protect the claimant in joint petition settlements; however, there is another objective, also to be valued, and that is the achieving of finality where the parties have reached a fair compromise — hence, the proviso that the commission will have no further jurisdiction. *Bradford v. Arkansas State Hosp.*, 270 Ark. 99, 603 S.W.2d 896 (1980).

Employer Liability.

Employer can only discharge and settle both its present and future liability for all compensation benefits under a joint petition. *Brooks v. Arkansas-Best Freight Sys.*, 247 Ark. 61, 444 S.W.2d 246 (1969).

General Release.

This section does not authorize a general release discharging an employer from "any and all" liability; rather, it provides only that, upon approval of a joint petition, the commission loses jurisdiction over any claim for the same injury or any results arising from it. *Wesley v. Monterey Constr. Co.*, 32 Ark. App. 157, 801 S.W.2d 49 (1990).

Jurisdiction.

A chancery court did not have jurisdiction to set aside the commission's order approving a joint petition for final settlement which the claimant alleged was procured from him by the fraudulent representation of the claims adjustor and the examining physician of the insurance carrier that his condition was less serious than it actually was. *Johnson v. Lumbermen's Reciprocal Ins. Exch.*, 249 Ark. 550, 460 S.W.2d 53 (1970).

This section is clear and unambiguous in stating that a joint petition settlement, approved by the Workers' Compensation Commission, eliminates the commission's jurisdiction over any additional claim for the same injury or any results arising from that injury; and that interpretation was correct even though claimant's joint

petition specifically stated that she did not waive any rights against the Second Injury Fund and even though such a provision was also included in the administrative law judge's opinion approving the joint petition. *Sayre v. State Second Injury Fund*, 12 Ark. App. 238, 674 S.W.2d 941 (1984).

Where employee sustained a compensable injury to his shoulder and filed a claim for benefits which was settled by joint petition, and then filed a separate claim for benefits for a work-related injury to his neck, which injury allegedly occurred on a date prior to the date of the shoulder injury; absent a finding that the two claims arose from a single injury, it was error for the commission to decline jurisdiction over the unsettled neck injury claim pursuant to subsection (b). *Wesley v. Monterey Constr. Co.*, 32 Ark. App. 157, 801 S.W.2d 49 (1990).

The circuit court correctly concluded that it was without jurisdiction to settle a dispute over a joint petition approved by an administrative law judge as finality was not achieved because the joint petition did not specify what medical expenses were to be paid and did not set out a specific award relating to those expenses. *Moore v. Wausau Ins. Co.*, 74 Ark. App. 201, 47 S.W.3d 274 (2001).

Modifications.

Section 11-9-713 provides for modification of awards generally; however, it specifically excepts from its provisions awards made under this section. *Cook v. Brown*, 246 Ark. 11, 436 S.W.2d 482 (1969).

Petition to Set Aside.

A petition to set aside an award, claiming that petitioner did not understand the legal ramifications of the joint petition, was not granted where assertions in the petition were contrary to the express language of the joint petition and in direct conflict with the record made at the hearing on the joint petition. *Cook v. Brown*, 246 Ark. 11, 436 S.W.2d 482 (1969).

Remand.

Where the litigants reached a settlement while an appeal was pending, they were entitled to have the case remanded to the Workers' Compensation Commission on their joint motion with leave to apply to the commission for approval of

their joint settlement. *Greer Lumber Co. v. Doles*, 238 Ark. 421, 382 S.W.2d 189 (1964).

Second Joint Petition.

Workers' Compensation Commission must conduct a new hearing on a second joint petition for final settlement of a claim after a hearing has been held on a prior joint petition but before an order disposing of the first petition has been entered; approval of the second petition without a second hearing did not deprive the commission of jurisdiction to entertain the claimant's petition requesting a determination of the status of his compensation claim. *Jacob Hartz Seed Co. v. Thomas*, 253 Ark. 176, 485 S.W.2d 200 (1972).

Settlement.

An agreement for final settlement approved by the commission without a hearing and evidenced only by letters to the commission from the employer and the claimant's attorney was not a final settlement within the meaning of this section. *Georgia-Pacific Corp. v. Norsworthy*, 244 Ark. 399, 425 S.W.2d 320 (1968).

Where claimant must have learned no later than the hearing on a joint petition for settlement that if he wanted the payment for injury and other benefits, he could not, under the law, enter into a settlement that left future medical expenses open, the commission's finding that the claimant understood this and agreed to it is fully justified; any doubts which claimant may have harbored concerning the finality of the settlement were amply cured in the face of an inordinate delay before the attempt to reopen the petition, notwithstanding his awareness that payment of medical bills had been refused by his employer. *Bradford v. Arkansas State Hosp.*, 270 Ark. 99, 603 S.W.2d 896 (1980).

Where there was variance between terms of joint petition and joint petition order, but proper procedure was followed in promulgating order and claimant was aware that settlement was final, claimant could not reopen claim after long time lapse on basis of claim that order should have included payment of future medical expenses. *Bradford v. Arkansas State Hosp.*, 270 Ark. 99, 603 S.W.2d 896 (1980).

Although the law favors compromise settlements, that general rule does not

apply to joint petition settlements of Workers' Compensation claims. *Odom v. Tosco Corp.*, 12 Ark. App. 196, 672 S.W.2d 915 (1984).

An agreement for settlement between the parties has no effect on the parties' rights until a hearing is conducted by the commission as required by this section, thus an agreement reached between a claimant and her employer was not effective and could not be enforced where the claimant died before the commission held a hearing on whether to approve the agreement. *Odom v. Tosco Corp.*, 12 Ark. App. 196, 672 S.W.2d 915 (1984).

Claimant's settlement with his employer and employer's insurance carrier precluded subsequent proceedings against the Second Injury Fund. *Ward v. Fayetteville City Hosp.*, 28 Ark. App. 73, 770 S.W.2d 668 (1989).

The finality of a joint petition settlement is viewed from the claimant's standpoint; and it is the claimant's right to proceed further that is extinguished. *Stratton v. Death & Permanent Total Dis-*

ability Trust Fund, 28 Ark. App. 86, 770 S.W.2d 678 (1989).

The commission's approval of a joint petition settlement eliminated its jurisdiction over "any claim for the same injury or any results arising from it," even where the joint petition contained language attempting to reserve the claimant's right to proceed against the Death and Permanent Total Disability Trust Fund. *Stratton v. Death & Permanent Total Disability Trust Fund*, 28 Ark. App. 86, 770 S.W.2d 678 (1989).

Third-party Tortfeasor.

Because a third-party tortfeasor is not a party covered under this section, both the insurance carrier and injured employee can proceed against such third party. *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997).

An insurance carrier was entitled to a statutory lien on sums recovered by a claimant from a third-party tortfeasor. *Vanderpool v. Fidelity & Cas. Ins. Co.*, 327 Ark. 407, 939 S.W.2d 280 (1997).

Cited: *Golston v. State*, 26 Ark. App. 176, 762 S.W.2d 398 (1988).

11-9-806. Disputed source of benefits.

(a) In any case where an employer changes insurance carriers or where the employer having been self-insured, becomes insured or, having been insured, is approved to be self-insured, and the only dispute in a claim against that employer is the proper source of payment of benefits, the Workers' Compensation Commission shall direct that the appropriate compensation benefits be paid on an equal basis by the carriers or self-insured employer.

(b) Upon eventual resolution of the issue, the prevailing respondent shall be entitled to reimbursement from the other respondent of all moneys paid together with interest at the legal rate from the date of payment.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1981, No. 290, § 9; A.S.A. 1947, § 81-1319.

11-9-807. Credit for compensation or wages paid.

(a) If the employer has made advance payments for compensation, the employer shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(b) If the injured employee receives full wages during disability, he or she shall not be entitled to compensation during the period.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1959, No. 167, § 1; A.S.A. 1947, § 81-1319.

CASE NOTES

ANALYSIS

Advance Payments.
Evidence.
Voluntary Payments.
Wages.

Advance Payments.

Employers were entitled to take credit for permanent partial disability compensation paid claimant prior to award of compensation to apply on his award for permanent partial disability. *Carty v. Ward Furn. Mfg. Co.*, 229 Ark. 725, 318 S.W.2d 148 (1958).

Where employee who had developed a debilitating disease had applied for and received weekly payments under a disability insurance policy furnished by employer through its workers' compensation carrier, and where employee later filed for workers' compensation benefits after expiration of his eligibility for the disability payments, employer and its compensation carrier were denied credit for the medical benefits because they were not advance payments of compensation. *Mohawk Tire & Rubber Co. v. Bridger*, 259 Ark. 728, 536 S.W.2d 126 (1976).

Only compensation paid in advance by the employer may be set off against an award. Private insurance procured by employee does not come within that provision of this section. *Emerson Elec. v. Cargile*, 5 Ark. App. 123, 633 S.W.2d 389 (1982).

Where insurance is provided and funded by the employer, the employer should be afforded the right to show that the payments were payments of compensation in advance under this section. But where the employer does no more than to make group coverage available at the employee's sole expense, no setoff should be allowed. *Emerson Elec. v. Cargile*, 5 Ark. App. 123, 633 S.W.2d 389 (1982).

The administrative law judge properly ruled that employer was not entitled to credit for any amounts paid claimant under the private employer/employee benefits insurance plan where there was no evidence that either party intended that

these payments constitute payments of compensation in advance. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

Employer was not entitled to credit for payments made for temporary total disability prior to a determination of permanent total disability. *Sparks Regional Medical Ctr. v. Death & Permanent Total Disability Bank Fund*, 22 Ark. App. 204, 737 S.W.2d 463 (1987).

Arkansas Workers' Compensation Commission did not err in approving a three-percent offset for overpayment of a claimant's permanent anatomical impairment rating to the insurer against the claimant's future benefits because the Commission had the full power and authority under § 11-9-207(a)(7) to order the reimbursement of employers for amounts advanced and because sound policy reasons existed for awarding credit for an overpayment of benefits. *Maulding v. Price's Util. Contrs., Inc.*, 2009 Ark. App. 776, 358 S.W.3d 915 (2009), rehearing denied, 2010 Ark. App. 51, — S.W.3d — (2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 222 (Apr. 22, 2010), review denied, — Ark. —, — S.W.3d —, 2010 Ark. LEXIS 227 (Apr. 22, 2010).

Employer was not entitled to offset for advanced payment of compensation as defined by this section, which it made to a claimant, as there was no showing that both parties intended the payments as such. *Main v. McGehee Metals*, 2010 Ark. App. 585, — S.W.3d — (2010).

Evidence.

There was no substantial evidence to support finding by the commission that the payments made to plaintiff were payments of compensation in advance. *Varnell v. Union Carbide*, 29 Ark. App. 185, 779 S.W.2d 542 (1989).

Voluntary Payments.

Where board entered an award for specific compensation, and employer during time of disability paid claimant an extra amount in the nature of a courtesy grant, employer was entitled to a credit for the

additional amount on the award. *Lion Oil Co. v. Reeves*, 221 Ark. 5, 254 S.W.2d 450 (1952). But see *Looney v. Sears, Roebuck & Co.*, 236 Ark. 868, 371 S.W.2d 6 (1963).

Where excess of wages over compensation, as received by employee, was intended by employer as a gratuity, employer would not be allowed to deduct the voluntary payments from the amount of Workers' Compensation award due employee. *Looney v. Sears, Roebuck & Co.*, 236 Ark. 868, 371 S.W.2d 6 (1963).

Wages.

Employer is entitled to have advance payments of compensation deducted from subsequent compensation award; however, when an employer continues to pay salary or wages to an injured employee, the excess of the wages paid over the

weekly compensation award cannot be deducted from the award. *Looney v. Sears, Roebuck & Co.*, 236 Ark. 868, 371 S.W.2d 6 (1963); *Southwestern Bell Tel. Co. v. Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966), superseded by statute as stated in, *Dooley v. Automated Conveyor Sys.*, 84 Ark. App. 412, 143 S.W.3d 585 (2004).

Disability which is compensable is based upon incapacity to earn because of injury; the payment of full wages during a compensable disability does not negate the incapacity to earn but may, in proper circumstances, dispense with the requirement that compensation benefits be paid under this section. *Arkansas La. Gas Co. v. Grooms*, 10 Ark. App. 92, 661 S.W.2d 433 (1983).

Cited: *Zenith Ins. Co. v. VNE, Inc.*, 61 Ark. App. 165, 965 S.W.2d 805 (1998).

11-9-808. Deposit or bond to secure payment.

The Workers' Compensation Commission may require any employer to make a deposit or bond with the commission to secure the prompt and convenient payment of compensation, and payments shall be made upon order of the commission.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1959, No. 167, § 1; A.S.A. 1947, § 81-1319.

11-9-809. Interest.

Compensation shall bear interest at the legal rate from the day an award is made by either an administrative law judge or the full Workers' Compensation Commission on all accrued and unpaid compensation.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1959, No. 167, § 1; A.S.A. 1947, § 81-1319.

CASE NOTES

ANALYSIS

In General.
Computation.
Medical Payments.

In General.

Workers' Compensation Rule 20, which was promulgated to implement a medical cost containment program with respect to compensable injuries, does not relieve a

workers' compensation insurance carrier from the obligation to pay interest under this section. *Burlington Indus. v. Pickett*, 64 Ark. App. 67, 983 S.W.2d 126 (1998).

Computation.

Interest upon accrued and unpaid installments of compensation is to be computed from the dates when they should have been paid, beginning, however, not earlier than the date on which a referee or

the full commission first enters an award allowing or denying the claim. *Clemons v. Bearden Lumber Co.*, 240 Ark. 571, 401 S.W.2d 16 (1966).

Eureka Log Homes v. Mantonya, 28 Ark. App. 180, 772 S.W.2d 365 (1989).

Cited: *Couch v. First State Bank*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Medical Payments.

Interest payable under this section includes interest on direct medical pay-

11-9-810. Notice of payment.

(a) Upon making the first payment and upon suspension of payment of compensation, the employer shall notify the Workers' Compensation Commission of that fact on a form prescribed by the commission.

(b)(1) Within thirty (30) days after the final payment of compensation has been made, the employer shall send to the commission a notice, in accordance with a form prescribed by the commission. This form shall state that the final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the person to whom compensation has been paid.

(2) If the employer fails so to notify the commission within that time, the commission may assess against the employer a civil penalty in an amount not exceeding one hundred dollars (\$100), but no penalty shall be assessed without notice to the employer, giving the employer an opportunity to be heard.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1959, No. 167, § 1; A.S.A. 1947, § 81-1319.

11-9-811. Investigations.

Upon its own initiative at any time where compensation payments are being made without an award, the Workers' Compensation Commission may and in any case where the right to compensation has been controverted or where payments of compensation have been suspended, or where an employer seeks to suspend payments made under an award, or on application of an interested party, the commission shall make such investigation, cause such medical examination to be made, hold such hearings, and take such further action as the commission deems proper for the protection of the rights of all parties.

History. Init. Meas. 1948, No. 4, § 19, Acts 1949, p. 1420; Acts 1953, No. 167, § 1; A.S.A. 1947, § 81-1319.

CASE NOTES

ANALYSIS

Commission's Authority.
Medical Examination.

Commission's Authority.

Arkansas Workers' Compensation Commission erred in holding that an employee was entitled to implantation of a dorsal-column stimulator if additional testing and examination showed it to be necessary because the finding that another evaluation needed to occur was a tacit admission that the record did not contain evidence sufficient to rule outright that additional treatment was reasonable and necessary; the Commission was not authorized to reserve making determinations on compensability and additional benefits when those were the only issues litigated. *Sea Ark Marine, Inc. v. Pippinger*, 2009 Ark. App. 223, 303 S.W.3d 102 (2009).

Medical Examination.

Under this section the commission has authority to cause a medical examination to be made upon its own initiative and to take whatever action it deems proper for the protection of all parties involved; no prejudicial error was involved when the court admitted the report of a doctor, who performed a test on the appellant, that was allegedly not confined to test results but also included conclusions of general condition. *Plants v. Townsend Curtner*

Lumber Co., 247 Ark. 824, 448 S.W.2d 349 (1969).

Where court remanded case to commission with directions to reopen case and, if necessary, employ a qualified medical specialist to provide testimony upon the issue of compensation, the procedure was based on a misconstruction of this section which confers the discretion to require a medical examination upon the commission, not the court; accordingly, the court decision was reversed and commission's denial of the claim reinstated. *Buckeye Cotton Oil v. McCoy*, 272 Ark. 272, 613 S.W.2d 590 (1981).

Plain language of § 11-9-511(a) and this section did not authorize the Arkansas Workers' Compensation Commission (Commission) to, sua sponte, order an independent medical examination (IME) after the parties had litigated compensability and additional benefits; these statutes did not give the Commission authority to reserve making determinations on compensability and additional benefits when those were the only issues litigated by the parties, and the Commission did not err in finding that the administrative law judge exceeded his authority when he ordered an IME. *Burkett v. Exxon Tiger Mart, Inc.*, 2009 Ark. App. 93, 304 S.W.3d 2 (2009).

Cited: *Sea Ark Marine, Inc. v. Pippinger*, 2010 Ark. App. 13, — S.W.3d — (2010).

11-9-812. Incarceration of injured employee.

(a)(1) When any person who receives workers' compensation benefits is incarcerated in an institution under the control of the Department of Correction, the inmate's spouse or, if no spouse, the inmate's minor dependent children, may petition the Workers' Compensation Commission to award to the spouse or minor dependent children the inmate's workers' compensation weekly disability benefits for the period of the claimant's incarceration.

(2) If the inmate has no surviving spouse or surviving minor dependent children, the department may petition the commission to award to the department the amount of the workers' compensation weekly disability benefits for the period of the claimant's incarceration necessary to reimburse the department for the cost of incarcerating the inmate.

(b) The commission shall promulgate regulations necessary for the implementation of this section.

History. Acts 1993, No. 372, §§ 1, 2.

CASE NOTES

Healing Period.

The fact that an injured employee is incarcerated is immaterial to his entitlement to benefits as long as the employee

remains within his healing period and has not returned to work. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

11-9-813. Deductibles.

(a)(1) Upon approval by the Insurance Commissioner, and following the adoption of such rules and regulations as the Insurance Commissioner deems necessary and advisable, each insurer issuing a policy under this chapter shall offer, as a part of the policy or as an optional endorsement to the policy, deductibles optional to the policyholder for benefits payable under this chapter.

(2) Deductible amounts offered shall be fully disclosed to the prospective policyholder in writing in the amount of one hundred dollars (\$100), two hundred dollars (\$200), three hundred dollars (\$300), four hundred dollars (\$400), and five hundred dollars (\$500), or increments of five hundred dollars (\$500), up to a maximum of two thousand five hundred dollars (\$2,500) per compensable claim, or in such other amounts as may be set by the Insurance Commissioner.

(3) The policyholder exercising the deductible option shall choose only one (1) deductible amount.

(b) Optional deductibles shall be offered in each policy insuring liability for workers' compensation that is issued, delivered, issued for delivery, or renewed under this chapter on or after approval by the Insurance Commissioner, unless an insured employer and insurer agree to renegotiate a workers' compensation policy in effect on that date so as to include a provision allowing for a deductible.

(c)(1) If the policyholder exercises the option and chooses a deductible, the insured employer shall be liable for the amount of the deductible for benefits paid for each compensable claim of work injury suffered by an employee.

(2) The insurer shall pay all or part of the deductible amount, whichever is applicable to a compensable claim, to the person or medical provider entitled to the benefits conferred by this chapter and then seek reimbursement from the insured employer for the applicable deductible amount.

(3) The payment or nonpayment of deductible amounts by the insured employer to the insurer shall be treated under the policy insuring the liability for workers' compensation in the same manner as payment or nonpayment of premiums.

(d) If the Insurance Commissioner determines it to be feasible, and under such rules and regulations as he or she may adopt, premium reduction for deductibles may be determined before the application of any experience modification, premium surcharge, or premium discounts, and, to the extent that an employer's experience rating or safety

record is based on benefits paid, money paid by the insured employer under a deductible as provided in this section may not be included as benefits paid so as to harm the experience rating of the employer.

(e) This section shall not apply to employers who are approved to self-insure against liability for workers' compensation or group self-insurance funds for workers' compensation.

History. Acts 1993, No. 796, § 34.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall im-

pliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

SUBCHAPTER 9 — WORKERS' COMPENSATION PRIVATE SECTOR SELF-INSURER
GUARANTY FUNDS

SECTION.	SECTION.
11-9-901. Creation — Exemption.	11-9-906. Money to be vested in corpora- tion — Annual audit.
11-9-902. Regulations.	11-9-907. Investment — Use of funds.
11-9-903. Liability.	11-9-908. Subrogation.
11-9-904. Amount of fund — Assessment — Inadequacy.	11-9-909. Action against self-insurer.
11-9-905. Report to board of directors on financial condition of self- insurer.	11-9-910. Private sector participants.
	11-9-911. Termination of self-insurer sta- tus — Liability.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-8 may not apply to subchapter 9, which was enacted subsequently.

Effective Dates. Acts 1993, No. 452, § 5: Mar. 10, 1993. Emergency clause provided: "An emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 825, § 14: Mar. 29, 1995. Emergency clause provided: "It is hereby

found and determined by the General Assembly that many of the small business operators of the state of Arkansas are currently being forced to pay excessive rates to provide workers compensation insurance for their employees and that the immediate passage of this act is necessary to grant them relief and to continue coverage for their employees. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect on and after its passage."

11-9-901. Creation — Exemption.

(a)(1)(A) The Workers' Compensation Commission is hereby authorized to recognize two separate entities formed under the Arkansas Nonprofit Corporation Act, §§ 4-28-201 — 4-28-206 and §§ 4-28-209 — 4-28-223, to function as guaranty funds for Arkansas workers' compensation self-insurers in the private sector.

(B) One (1) guaranty fund will be established for individual self-insurers and homogeneous self-insurer groups, as defined in § 11-9-404(a)(3)(A).

(C) A separate guaranty fund will be established for common self-insurer groups, as defined in § 11-9-404(a)(3)(B).

(2) The two (2) funds shall be created, funded, and administered completely independently from each other.

(3) The assets of the two (2) funds shall remain separate for all purposes and cannot be combined, and the assets of one (1) fund shall not be utilized to satisfy the obligations of the other fund.

(b) Public sector self-insurers are specifically exempted from the provisions of this subchapter.

(c) As used in this subchapter, "public sector self-insurer" means a group of municipalities, a city, a county, or the state entity which directly exercises control over an employee and which pays the employee's salary.

History. Acts 1991, No. 756, §§ 1, 8; 1993, No. 452, § 1; 1995, No. 825, § 2.

11-9-902. Regulations.

The Workers' Compensation Commission shall promulgate regulations to implement this subchapter.

History. Acts 1991, No. 756, § 9.

11-9-903. Liability.

There shall be no liability on the part of, and no cause of action of any nature shall lie, whether at law or in equity, against any agent or employee of the two (2) corporations, their boards of directors, any Arkansas workers' compensation self-insurer, or the Workers' Compensation Commission or any of its representatives on account of any action or inaction by any of them in the administration of the workers' compensation self-insurer guaranty funds or the performance of their duties in connection therewith.

History. Acts 1991, No. 756, § 6; 1995, No. 825, § 3.

11-9-904. Amount of fund — Assessment — Inadequacy.

(a) Each corporation acting as the guaranty fund shall independently determine periodically the amount of money each Arkansas workers' compensation self-insurer should contribute to each fund in order to provide an adequate pool of money to pay workers' compensation benefits owed by an Arkansas self-insurer when such self-insurer fails to meet its workers' compensation benefits obligations.

(b) The Workers' Compensation Commission shall assess all workers' compensation self-insurers in an amount determined by each

corporation, and the commission shall transmit the moneys collected to each corporation to be used solely to make workers' compensation benefit payments from each fund and to defray the expenses of each fund.

(c) At any time that a workers' compensation self-insurer guaranty fund becomes inadequate to make payments to its claimants, the balance of that fund shall be prorated equally among the claimants, and the Arkansas workers' compensation self-insurers who are members of that fund shall be assessed an amount necessary to pay the outstanding claims and expenses and to replenish that fund.

(d) The inadequacy of one (1) fund to make payments to claimants shall have no effect on the operation of the remaining fund, nor shall the assets of the remaining fund be utilized in any manner to satisfy the claims of claimants to the fund suffering from the inadequacy.

History. Acts 1991, No. 756, §§ 1, 3; 1995, No. 825, § 4.

11-9-905. Report to board of directors on financial condition of self-insurer.

The Workers' Compensation Commission shall report to the board of directors of each corporation when the commission has reasonable cause to believe that the payment of potential claims by an Arkansas workers' compensation self-insurer is or may be jeopardized by the existing or potential financial condition of the self-insurer. The board of directors of the corporation which has the affected self-insurer as a member shall, based upon such information as is reasonably available, report to the commission upon all matters germane to the solvency, liquidation, rehabilitation, or conservation of any workers' compensation self-insurer, and such reports shall not be deemed public documents under the Freedom of Information Act of 1967, § 25-19-101 et seq., or any other law.

History. Acts 1991, No. 756, § 5; 1995, No. 825, § 5.

11-9-906. Money to be vested in corporation — Annual audit.

(a) Moneys collected by the Workers' Compensation Commission and disbursed to each corporation shall be vested in the corporation and shall not be deemed state property and shall not be subject to appropriation by the General Assembly.

(b) Each corporation shall annually submit to an audit by an independent certified public accountant, and a copy of the audit report shall be transmitted to the commission.

History. Acts 1991, No. 756, § 4; 1995, No. 825, § 6.

11-9-907. Investment — Use of funds.

The board of directors of each corporation shall direct the investment of moneys in each workers' compensation self-insurers guaranty fund, and all returns on the investments shall be retained in each fund. The moneys in each fund shall be used solely to compensate persons entitled to receive workers' compensation benefits from an Arkansas self-insurer which is unable to meet its workers' compensation benefits obligations and to defray the expenses of each fund.

History. Acts 1991, No. 756, § 4; 1995, No. 825, § 7.

11-9-908. Subrogation.

(a) Each corporation shall have full rights of subrogation against any source of payment or reimbursement for payments made by the corporation on behalf of an Arkansas workers' compensation self-insurer.

(b) Each corporation shall have a right of recovery through the maintenance of an action against any third party, other than a coemployee, who is in any way responsible or liable for injury or death to a covered worker.

History. Acts 1991, No. 756, § 4; 1995, No. 825, § 8.

11-9-909. Action against self-insurer.

(a) Each corporation is also authorized to take all necessary action, including bringing an action at law or in equity, to seek any available relief as against any workers' compensation self-insurer, whether the self-insurer has paid all assessments levied by the Workers' Compensation Commission on behalf of the corporation.

(b) If a corporation is required to bring an action at law or in equity to enforce any obligations, rights; or duties as regards a workers' compensation self-insurer, the court may award reasonable attorney's fees and costs to that corporation.

History. Acts 1991, No. 756, § 4; 1995, No. 825, § 9.

11-9-910. Private sector participants.

All private sector participants in the Arkansas workers' compensation self-insurers' program may be members of one (1) of the corporations acting as guaranty funds, and the Workers' Compensation Commission may revoke any such self-insurer's authority to act as a workers' compensation self-insurer if the self-insurer fails to maintain membership in the applicable corporation or fails to pay the assessments levied by the commission under this subchapter.

History. Acts 1991, No. 756, § 7; 1995, No. 825, § 10.

11-9-911. Termination of self-insurer status — Liability.

Any person or entity whose workers' compensation self-insurer status is terminated shall thereafter be subject to no further assessments by the Workers' Compensation Commission, but shall remain liable for all assessments due prior to the date of termination.

History. Acts 1991, No. 756, § 2.

SUBCHAPTER 10 — REVISION OF WORKERS' COMPENSATION LAWS

SECTION.

11-9-1001. Legislative declaration.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-8 may not apply to subchapter 10, which was enacted subsequently.

Publisher's Notes. Acts 1993, No. 796, § 38, provided: "All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the code specifically including Section 35."

Effective Dates. Acts 1993, No. 796, § 41: July 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that the Work-

ers' Compensation Law is in immediate need of substantial revision; that this act accomplishes immediate revision; and that this act shall go into effect as soon as is practical which is determined to be July 1, 1993; and that unless this emergency clause is adopted, this act will not go into effect until after July 1, 1993. Therefore, an emergency is hereby declared to exist, and this act being immediately necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1993. Furthermore, the provisions of this act shall apply only to injuries which occur after July 1, 1993."

RESEARCH REFERENCES

Ark. L. Rev. Copeland, The New Arkansas Workers' Compensation Act: Did

the Pendulum Swing Too Far?, 47 Ark. L. Rev. 1.

11-9-1001. Legislative declaration.

The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. Unfortunately, many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state. The Seventy-Ninth General Assembly intends to restate that the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legiti-

mately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force. When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision in this act. In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

History. Acts 1993, No. 796, § 35.

A.C.R.C. Notes. Acts 1993, No. 796, § 38, provided: "All provisions of this act of a general and permanent nature are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code Revision Commission shall incorporate the same in the code specifically including Section 35."

Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is ex-

pressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Meaning of "this act". Acts 1993, No. 796, also codified as § 11-9-101, § 11-9-102, §§ 11-9-105 — 11-9-107, § 11-9-109, § 11-9-113, § 11-9-114, § 11-9-401, § 11-9-402, § 11-9-406, §§ 11-9-408 — 11-9-411, § 11-9-501, § 11-9-503, § 11-9-505, § 11-9-506, § 11-9-508, § 11-9-514, § 11-9-516, § 11-9-519, § 11-9-521, § 11-9-522, § 11-9-527, § 11-9-529, §§ 11-9-702 — 11-9-705, § 11-9-707, § 11-9-713, § 11-9-717, § 11-9-802, § 11-9-805, and § 11-9-813.

CASE NOTES

ANALYSIS

Construction.

Burden of Proof.

Dependency Benefits.

Second Injury Fund.

Construction.

Construing the provisions of the Workers' Compensation Act strictly, the Workers' Compensation Commission abused its discretion in dismissing as untimely a worker's pro se notice of appeal from an order of an administrative law judge (ALJ) denying permanent total disability for carpal tunnel injuries because the ALJ's order could not become final under § 11-9-711(a)(1) until 30 days after the worker received a copy where the worker's

attorney was disbarred 26 days after receiving a copy and thus did not have a full 30 days to appeal. *Kirkendolph v. DF&A Revenue Servs. Div.*, 2009 Ark. App. 629, — S.W.3d — (2009).

Burden of Proof.

The strict construction mandate of Acts 1993, No. 796 and the requirement that the appellate court view the evidence in a light most favorable to the Workers' Compensation Commission's decision and uphold that decision if it is supported by substantial basis for denying relief do not change the requirement that the Workers' Compensation Commission must have, in fact, a substantial basis for denying a claim for benefits; the substantial evidence test is not satisfied by evidence

which merely creates a suspicion. *Matlock v. Ark. Blue Cross Blue Shield*, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

Dependency Benefits.

The legislative intent as expressed in this section contains nothing to support the view that prior case law in regard to dependency benefits was repealed. *Lawhon Farm Servs. v. Brown*, 60 Ark. App. 64, 958 S.W.2d 538 (1997), *aff'd*, 335 Ark. 272, 984 S.W.2d 1 (1998).

Second Injury Fund.

Because this section discourages judicial lawmaking and because the Court of Appeals must defer to decisions of the Supreme Court, the appeals court could not broaden the scope of workers' compensation law so that the Second Injury Fund would become liable for wage-loss disability benefits payable to a disabled worker in the event of successive injuries during the same employment. *Maxey v. Tyson*

Foods, Inc., 341 Ark. 306, 18 S.W.3d 328 (2000).

Cited: *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996); *Duke v. Regis Hairstylists*, 55 Ark. App. 327, 935 S.W.2d 600 (1996); *Olsten Kimberly Quality Care v. Pettey*, 55 Ark. App. 343, 934 S.W.2d 956 (1996); *Daniel v. Firestone Bldg. Prods.*, 57 Ark. App. 123, 942 S.W.2d 277 (1997); *Tillman v. Baldwin & Shell Constr.*, 58 Ark. App. 177, 948 S.W.2d 118 (1997); *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997); *ERC Contractor Yard & Sales v. Robertson*, 60 Ark. App. 310, 961 S.W.2d 36 (1998); *Nelson v. Timberline Int'l*, 332 Ark. 165, 964 S.W.2d 357 (1998); *Superior Indus. v. Thomaston*, 72 Ark. App. 7, 32 S.W.3d 52 (2000); *O'Hara v. J. Christy Constr. Co.*, 101 Ark. App. 212, 272 S.W.3d 842 (2008); *Singleton v. City of Pine Bluff*, 102 Ark. App. 305, 285 S.W.3d 253 (2008); *Tyson Poultry, Inc. v. Narvaiz*, 2012 Ark. 118, — S.W.3d — (2012).

CHAPTER 10

DEPARTMENT OF WORKFORCE SERVICES LAW

SUBCHAPTER.

1. GENERAL PROVISIONS.
2. DEFINITIONS.
3. ADMINISTRATION AND ENFORCEMENT.
4. EMPLOYER COVERAGE.
5. BENEFITS GENERALLY.
6. SHARED WORK PLANS.
7. CONTRIBUTIONS.
8. UNEMPLOYMENT COMPENSATION FUND.
9. DIVISION OF STATE NEW HIRE REGISTRY.
10. UNEMPLOYMENT TRUST FUND FINANCING ACT OF 2011.

A.C.R.C. Notes. References to "this chapter" in subchapters 1-8 may not apply

to subchapters 9 and 10 which were enacted subsequently.

RESEARCH REFERENCES

ALR. Alcoholism or intoxication as ground for discharge justifying denial of unemployment compensation, 64 A.L.R.4th 1151.

Burden of proof as to voluntariness of separation, 73 A.L.R.4th 1093.

Liability for retaliation against at-will employee for public complaints or efforts relating to health or safety, 75 A.L.R.4th 13.

Eligibility of employee who left employment based on belief that involuntary discharge was imminent, 79 A.L.R.4th 528.

Employee's loss of employment because of refusal to submit to drug test as affecting right to unemployment compensation, 86 A.L.R.4th 309.

Propriety of telephone testimony or hearings in unemployment compensation

proceedings, 90 A.L.R.4th 532.

Employer's state-law liability for withdrawing, or substantially altering, job offer for indefinite period before employee actually commences employment, 1 A.L.R.5th 401.

Eligibility as affected by claimant's refusal to work at particular times or on particular shifts for domestic or family reasons, 2 A.L.R.5th 475.

Eligibility for unemployment compensation as affected by claimant's voluntary separation or refusal to work alleging that the work is illegal or immoral, 41 A.L.R.5th 123.

Leaving employment to become self-employed or to go into business for oneself as affecting right to unemployment compensation, 45 A.L.R.5th 715.

Leaving employment in pursuit of other employment as affecting right to unemployment compensation, 46 A.L.R.5th 659.

What constitutes 'agricultural' or 'farm' labor within social security or unemployment compensation, 60 A.L.R.5th 459.

Leaving employment, or unavailability for particular job or duties, because of sickness or disability as affecting right to unemployment compensation, 68 A.L.R.5th 13.

Eligibility for unemployment compensation of employee who retires voluntarily, 75 A.L.R.5th 339.

Ark. L. Rev. Benefits from Social Legislation and Labor-Management Contracts: Accommodation of Collateral Sources in Arkansas, 20 Ark. L. Rev. 126.

CASE NOTES

ANALYSIS

Constitutionality.

Construction.

Purpose.

Federal Legislation.

Retroactivity.

Constitutionality.

Former similar law was not violative of the due process clause of the federal constitution, nor of constitutional provision guaranteeing right of trial by jury. *McKinley v. R.L. Payne & Son Lumber Co.*, 200 Ark. 1114, 143 S.W.2d 38 (1940) (decision under prior law).

This chapter does not violate the due process clause of the federal constitution. *Hickenbottom v. McCain*, 207 Ark. 485, 181 S.W.2d 226 (1944), cert. denied, 323 U.S. 777, 65 S. Ct. 189 (1944).

This chapter does not violate the constitutional provision forbidding the general assembly from creating any permanent state offices not provided for in the constitution. *Hickenbottom v. McCain*, 207 Ark. 485, 181 S.W.2d 226 (1944), cert. denied, 323 U.S. 777, 65 S. Ct. 189 (1944).

This chapter does not violate the constitutional provisions dividing the state government into three distinct departments. *Hickenbottom v. McCain*, 207 Ark. 485, 181 S.W.2d 226 (1944), cert. denied, 323 U.S. 777, 65 S. Ct. 189 (1944).

This chapter was enacted under the general police power and not the taxing

power and therefore the contributions involved do not constitute taxes within the meaning of Ark. Const., Art. 9, § 3. *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958).

Construction.

This chapter must be strictly construed in favor of the taxpayer and against the state. *McCain v. Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114 (1943).

This chapter must be given an interpretation in keeping with the declaration of state policy. *Little Rock Furn. Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957).

This chapter is designed to protect the employee from becoming unemployed through no fault of his own; it is remedial in nature and must be liberally construed in order to accomplish its beneficent purpose. *Graham v. Daniels*, 269 Ark. 774, 601 S.W.2d 229 (Ct. App. 1980).

Purpose.

This chapter is intended to encourage employers who meet all requirements by conducting business in a way to promote social security. *Lion Oil Ref. Co. v. McCain*, 204 Ark. 995, 166 S.W.2d 249 (1942).

The benevolent purpose of this chapter is to provide unemployment reserves to be used for the benefit of persons unemployed through no fault of their own. *Wells v. Everett*, 5 Ark. App. 303, 635 S.W.2d 294 (1982); *Sanyo Mfg. Corp. v. Stiles*, 17 Ark. App. 20, 702 S.W.2d 421 (1986).

Federal Legislation.

The federal congress has not preempted the state legislature in the matter of coverage and exemptions in the field of employment security legislation. *Arkansas Valley Indus., Inc. v. Laney*, 242 Ark. 261, 412 S.W.2d 817 (1967).

Retroactivity.

The legislature had power to substitute this chapter for former acts and to make it retroactive, provided it did not disturb any vested rights, but since legislature expressly reserved in former acts the right to amend or repeal and provided there would be no vested private right of any kind, provisions of this chapter should control in adjudication of cases pending and not finally determined at its effective dates. *Crossett Lumber Co. v. McCain*, 205 Ark. 631, 170 S.W.2d 64 (1943), superseded by statute as stated in, *Morris v. Everett*, 647 S.W.2d 476 (1983).

Rights and liabilities arising under the former law but still undetermined when this chapter became effective were to be determined under the provisions of this chapter. *Southern Kraft Corp. v. McCain*, 205 Ark. 943, 171 S.W.2d 947 (1943).

Cited: *Southwestern Bell Tel. Co. v. Thornbrough*, 232 Ark. 929, 341 S.W.2d 1 (1960); *Thornbrough v. Gage*, 234 Ark. 15, 350 S.W.2d 306 (1961); *Hanford Produce Co. v. Clemmons*, 242 Ark. 240, 412 S.W.2d 828 (1967); *Middleton v. Arkansas Employment Sec. Div.*, 265 Ark. 11, 576 S.W.2d 218 (1979); *Loftin v. Daniels*, 268 Ark. 611, 594 S.W.2d 578 (Ct. App. 1980); *Victor Indus. Corp. v. Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981); *Area Agency on Aging of W. Cent. Ark., Inc. v. Everett*, 279 Ark. 47, 648 S.W.2d 467 (1983); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983); *Jones v. Singer Career Sys.*, 584 F. Supp. 1253 (E.D. Ark. 1984).

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

- 11-10-101. Title.
- 11-10-102. Policy.
- 11-10-103. Intent.
- 11-10-104. Construction.
- 11-10-105. Legislative power to amend and repeal — Vested rights restricted.
- 11-10-106. Penalties.
- 11-10-107. Protection of rights and benefits — Waiver of rights void — Discrimination, obstruction, and employee payment prohibited.

SECTION.

- 11-10-108. Protection of rights and benefits — Limitation of fees.
- 11-10-109. Protection of rights and benefits — Assignment, pledge, or encumbrance of benefits prohibited.
- 11-10-110. Protection of rights and benefits — Exception for withholding child support.
- 11-10-111. Protection of rights and benefits — Exception for withholding food stamp overages.

Cross References. Unemployment compensation income withholding for alimony or support payments, § 9-14-227.

Effective Dates. Acts 1971, No. 35, § 25: approved Feb. 3, 1971. Emergency clause provided: "It is determined by the General Assembly of the State of Arkansas that an unemployment crisis exists in this State and in order to give better protection to the unemployed and their families extended benefits of the unemployment insurance program should be made available and to alleviate as much as possible the suffering and distress caused by unemployment, it is necessary

to work in cooperation with the federal government; and in order to receive the benefits of federal law and comply with the mandate of the United States Congress as provided in United States Public Law 91-373, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety, this Act shall take effect and be in force from and after its passage."

Acts 1977, No. 366, § 14: Mar. 17, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Ar-

kansas Employment Security Law of the State are in need of immediate clarification and revision in order to provide adequate protection to the employed and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1981 (1st Ex. Sess.), No. 37, § 11: Dec. 2, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to bring the Arkansas Employment Security Law in conformity with the amendments to the Federal Unemployment Tax Act contained in Public Law 97-35 and to comply with other provisions of Federal law mandated by Public Law 97-35 so that Arkansas employers may continue to receive tax credits accorded by the Federal Unemployment Tax Act and so that Arkansas workers may receive unemployment benefits when unemployed and qualified to receive such benefits, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1983, No. 482, § 41: Mar. 16, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to conform with P.L. 97-300 and to bring the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 97-248 and to insure the future solvency of the unemployment insurance fund so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1985, Nos. 8, 9, § 34: Jan. 30, 1985. Emergency clauses provided: "It is hereby found and determined by the General Assembly that in order to bring the Arkansas

Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended by P.L. 98-21 and P.L. 98-369, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1987, No. 753, § 30: July 1, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections to the Shared Work plan provisions which enable employers to avoid layoffs and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1987."

Acts 1991, No. 100, § 58: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of this act should become effective at the beginning of the next fiscal year; that the next fiscal year begins on July 1, 1991 and this act may not go into effect until after July 1, 1991 unless an emergency is declared. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

Acts 1993, No. 6, § 21: Feb. 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to

make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1997, No. 234, § 32: Feb. 21, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1116, § 19: Apr. 5, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that in order to

correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2007, No. 490, § 18: Mar. 26, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the act should go into effect as soon as possible in order to make needed technical changes; to enable the state to capture and utilize penalty and interest owing from claimants; and in order that the state might continue to be in compliance with the Federal Unemployment Tax Act, as amended. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

Am. Jur. 76 Am. Jur. 2d, Unemp. Comp., § 1 et seq.

Ark. L. Rev. Note, In re Holt: Personal Property Exemptions and the Forgotten

Arkansas Constitution, 42 Ark. L. Rev. 759.

C.J.S. 81 C.J.S., Soc. Sec., etc., § 146 et seq.

11-10-101. Title.

This chapter shall be known and may be cited as the “Department of Workforce Services Law”.

History. Acts 1941, No. 391, § 1; 1949, No. 155, § 1; 1977, No. 366, § 1; A.S.A. 1947, § 81-1102; Acts 2007, No. 490, § 1.

11-10-102. Policy.

As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows:

(1) Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is a subject of general interest and concern which requires appropriate action by the General Assembly to prevent its spread and to lighten its burden which may fall with crushing force upon the unemployed worker and his or her family. The achievement of social security requires protection against this great hazard of our economic life.

(2) This can be accomplished by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment from which benefits may be paid for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance.

(3) The General Assembly, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

History. Acts 1941, No. 391, preamble; 1949, No. 155, preamble; A.S.A. 1947, § 81-1101.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Johnson, Survey of Arkansas Law: Labor Law, 2 U. Ark. Little Rock L.J. 259.

CASE NOTES**Construction.**

This section must be considered in interpreting this chapter. Little Rock Furn. Mfg. Co. v. Commissioner of Labor, 227 Ark. 288, 298 S.W.2d 56 (1957).

Cited: Razorback Vacuum v. Director, Ark. Emp. Sec. Dep’t, 44 Ark. App. 19, 865 S.W.2d 649 (1993); Hiner v. Director, Ark. Emp. Sec. Dep’t, 61 Ark. App. 139, 965 S.W.2d 785 (1998).

11-10-103. Intent.

The General Assembly declares its intention to provide for the carrying out of the purposes of this chapter in cooperation with the appropriate agencies of other states and of the federal government as part of a nationwide employment security program to secure for this state and its citizens the grants and privileges available thereunder.

History. Acts 1941, No. 391, § 1; 1949, No. 155, § 1; A.S.A. 1947, § 81-1102.

11-10-104. Construction.

This chapter shall be construed to accomplish its purpose to promote employment security by increasing opportunities for placement through the maintenance of a system of public employment offices and by providing through accumulation of reserves for the payment of compensation to individuals who are involuntarily unemployed.

History. Acts 1941, No. 391, § 1; 1949, No. 155, § 1; A.S.A. 1947, § 81-1102.

11-10-105. Legislative power to amend and repeal — Vested rights restricted.

(a)(1) The General Assembly reserves the right to amend or repeal all or any part of this chapter or of any law heretofore enacted involving any employment security law.

(2) There shall be no vested private right of any kind against such amendment or repeal nor shall there be vested any right accruing except as specifically expressed in this chapter or heretofore.

(b) All rights, privileges, or immunities incurred by this chapter or by acts done pursuant thereto shall exist subject to the power of the General Assembly to amend or repeal this chapter or acts at any time.

History. Acts 1971, No. 35, § 22; A.S.A. 1947, § 81-1125.

CASE NOTES**Contribution Rate.**

Where an Employment Security Division regulation required an increased contribution rate from an employer for his failure to furnish certain information to the Commissioner of Labor within seven days from the mailing date of a notice requesting the information, the regulation was invalid as violative of due process,

notwithstanding this section which reserved to the legislature the right to amend or repeal any part of this chapter; because due process requires at a minimum that a person be given notice and a reasonable opportunity for a hearing before he is deprived of his property by state action. *Commissioner of Labor v. Purnell*, 267 Ark. 593, 593 S.W.2d 157 (1980).

11-10-106. Penalties.**(a) FALSE STATEMENT OR REPRESENTATION.**

(1) Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact to obtain or increase any benefit or other payment under this chapter or under the unemployment compensation law of any state or of the federal government, either for himself or herself or for any other person, shall be punished by a fine of not less than twenty dollars (\$20.00) nor more than fifty dollars (\$50.00) or by imprisonment for not longer than thirty (30) days, or by both fine and imprisonment.

(2) Each false statement or representation or failure to disclose a material fact shall constitute a separate offense.

(b) EMPLOYER'S FALSE STATEMENT OR REPRESENTATION.

(1) Any employing unit or any officer or agent of any employing unit or any other person who makes a false statement or representation knowing it to be false, who knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled thereto or to avoid becoming or remaining subject hereto or to avoid or reduce any contribution or other payment required from an employing unit under this chapter, or who willfully fails or refuses to make any contributions or other payment or to furnish any report required hereunder or to produce or permit the inspection or copying of records as required hereunder shall be punished by a fine of not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200) or by imprisonment for not longer than sixty (60) days, or by both fine and imprisonment.

(2) Each false statement or representation or failure to disclose a material fact and each day of the failure or refusal shall constitute a separate offense.

(c) WILLFUL VIOLATION.

(1) Any person who shall willfully violate any provision of this chapter or any order, rule, or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200) or by imprisonment for not longer than sixty (60) days, or by both fine and imprisonment.

(2) Each day the violation continues shall be deemed to be a separate offense.

(d) DISCLOSURE OF INFORMATION. If any employee or member of the Board of Review, the Director of the Department of Workforce Services, or any employee of the director, in violation of the provisions of § 11-10-314, makes any disclosure of information obtained from any employing unit or individual in the administration of this chapter; if any person who has obtained any list of applicants for work, or of claimants or recipients of benefits, under this chapter shall use or

permit the use of the list for any political purpose; or if any person who has lawfully obtained information from the Department of Workforce Services which was obtained from any employing unit or individual pursuant to the administration of this chapter makes an unlawful use or disclosure of the information or uses or discloses the information in a manner inconsistent with the purposes for which it was lawfully obtained, then that person shall be fined not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200) or imprisoned for not longer than ninety (90) days, or both.

(e) PROSECUTION AND APPEAL.

(1) Prosecutions for the violation of any of the provisions of this chapter may be begun by the filing of information in any court having jurisdiction, without bond for costs, by the director, any field auditor, or other duly authorized agent of the director.

(2) Appeals may be prosecuted from any verdicts or rulings contrary to the state, without appeal bonds, by the filing of a petition for appeal by any director, auditor, or agent.

(f) RETALIATION BY EMPLOYER OR AGENT OF EMPLOYER.

(1) Any employing unit or any officer or agent of any employing unit or any other person who retaliates in regard to the hiring or tenure of work or any term or condition of work of any individual on account of his or her participating in the preparation for or testifying in a proceeding under this chapter shall be punished by a fine of not less than twenty dollars (\$20.00) nor more than two hundred dollars (\$200) or by imprisonment for not longer than sixty (60) days, or both fine and imprisonment.

(2) Each act of retaliation shall constitute a separate offense.

(g) PENALTY IMPOSED BY DIRECTOR.

(1) The director is authorized and empowered to impose a penalty of ten percent (10%) of the face amount of the check, draft, or order, or ten dollars (\$10.00), whichever is greater, against any employer or individual that or who as maker, drawer, or endorser makes payment of any contributions, or benefit overpayments, which are due under this chapter by means of a check, draft, or order drawn on any bank, person, firm, or corporation if the check, draft, or order is returned by the bank, person, firm, or corporation without having been paid in full.

(2) This penalty is cumulative to any other penalties provided by law.

History. Acts 1941, No. 391, § 16; 1985, No. 9, § 29; A.S.A. 1947, § 81-1119; 1943, No. 138, § 21; 1947, No. 398, § 13; Acts 1987, No. 753, §§ 23, 24; 1991, No. 1983, No. 482, § 34; 1985, No. 8, § 29; 100, § 1; 1993, No. 6, § 1.

11-10-107. Protection of rights and benefits — Waiver of rights void — Discrimination, obstruction, and employee payment prohibited.

(a) Any agreement by an individual to waive, release, or commute his or her rights to benefits or any other rights under this chapter shall be void.

(b) Any agreements by an individual in the employ of any person or employing unit to pay all or any portion of an employer's contributions required under this chapter from the employer shall be void.

(c) No employer shall directly or indirectly make, require, or accept any deduction from wages to finance the employer's contributions required from him or her, require or accept any waiver of any right hereunder by any individual in his or her employ, discriminate in regard to the hiring or tenure or work on any term or condition of work of any individual on account of his or her claiming benefits under this chapter, or in any manner obstruct or impede the filing of claims for benefits.

(d) Any employer or officer or agent of an employer who violates any provisions of this section shall, for each offense, be fined not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) or be imprisoned for not more than six (6) months, or both.

History. Acts 1941, No. 391, § 15;
A.S.A. 1947, § 81-1118.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Legislative Survey, Business Law, 4 U. Ark. Little Rock L.J. 579.

CASE NOTES

Waiver of Rights.

To hold that entitlement to compensation during vacation shutdowns should be governed exclusively by the particular wording of the employment contract is in direct contravention to this section. Har-

mon v. Laney, 239 Ark. 603, 393 S.W.2d 273 (1965).

Cited: Southwestern Bell Tel. Co. v. Thornbrough, 232 Ark. 929, 341 S.W.2d 1 (1960).

11-10-108. Protection of rights and benefits — Limitation of fees.

(a) No individual claiming benefits shall be charged fees or costs of any kind in any proceeding under this chapter by the Board of Review, the Director of the Department of Workforce Services, or his or her or its representatives, or by any court or any officer thereof, except that, if the court determines that the proceedings for judicial review have been instituted or continued without reasonable grounds, it may assess costs against the claimant or employer instituting or continuing the proceedings.

(b)(1) Any individual claiming benefits in any proceeding before the director or the board or his or her or its representatives or a court may be represented by counsel or other duly authorized agent.

(2) No counsel or agents shall either charge or receive an aggregate amount of more than five hundred dollars (\$500) for services rendered

at the administrative appeal levels before the appeal tribunal or the board.

(c) Any person who violates any provision of this section shall, for each offense, be fined not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500) or imprisoned for not more than six (6) months, or both.

History. Acts 1941, No. 391, § 15; A.S.A. 1947, § 81-1118; Acts 1999, No. 1943, No. 138, § 20; 1983, No. 482, § 33; 1116, § 1.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Legislative Survey, Business Law, 4 U. Ark. Little Rock L.J. 579.

CASE NOTES

Cited: Southwestern Bell Tel. Co. v. Thornbrough, 232 Ark. 929, 341 S.W.2d 1 (1960).

11-10-109. Protection of rights and benefits — Assignment, pledge, or encumbrance of benefits prohibited.

(a) Except as elsewhere provided in this section and § 11-10-110, any assignment, pledge, or encumbrance of any right to benefits which are or may become due or payable under this chapter shall be void.

(b) Such rights to benefits shall be exempt from levy, execution, attachment, or any other remedy whatsoever provided for the collection of debt.

(c) Benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from any remedy whatsoever for the collection of all debts except debts incurred for necessities furnished to such individual or his or her spouse or dependents during the time when that individual was unemployed.

(d) Any waiver of any exemption provided for in this section and § 11-10-110 shall be void.

(e) Benefits shall be subject to tax levies issued by the Internal Revenue Service in accordance with 26 U.S.C. § 6331(h) provided that an agreement is entered into between the Internal Revenue Service and the Department of Workforce Services and approved by the United States Department of Labor that provides for the payment of all administrative costs associated with processing the tax levies.

History. Acts 1941, No. 391, § 15; 1981 (Ex. Sess.), No. 37, § 2; A.S.A. 1947, § 81-1118; Acts 1999, No. 1116, § 2.

Cross References. Handling costs for withholding, § 16-110-417.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Legislative Survey, Business Law, 4 U. Ark. Little Rock L.J. 579.

CASE NOTES

Cited: Southwestern Bell Tel. Co. v. Thornbrough, 232 Ark. 929, 341 S.W.2d 1 (1960).

11-10-110. Protection of rights and benefits — Exception for withholding child support.

(a) At the time of filing the claim, an individual filing a new claim for unemployment compensation shall disclose whether or not the individual owes child support obligations as defined under subsection (g)(1) of this section. If any individual discloses that he or she owes child support obligations and is determined to be eligible for unemployment compensation, the Director of the Department of Workforce Services shall notify the state or local child support enforcement agency enforcing the obligation that the individual has been determined to be eligible for unemployment compensation.

(b) The director shall deduct and withhold from any unemployment compensation payable to an individual who owes child support obligations as defined under subdivision (g)(1):

(1) The amount specified by the individual to the director to be deducted and withheld under this section if neither subdivisions (b)(2) nor (b)(3) of this section is applicable;

(2) The amount, if any, determined pursuant to an agreement submitted to the director under § 454(19)(B)(i) of the Social Security Act by the state or local child support enforcement agency, unless subdivision (b)(3) of this section is applicable; or

(3) Any amount otherwise required to be so deducted and withheld from his or her unemployment compensation pursuant to legal process, as that term is defined in § 462(e) of the Social Security Act, properly served upon the director.

(c) Any amount deducted and withheld under subsection (b) of this section shall be paid by the director to the appropriate state or local child support enforcement agency.

(d) Any amount deducted and withheld under subsection (b) of this section shall for all purposes be treated as if it were paid to the individual as unemployment compensation and paid by the individual to the state or local child support enforcement agency in satisfaction of the individual's child support obligations.

(e) For purposes of subsections (a)-(d) of this section, the term "unemployment compensation" means any compensation payable under this chapter, including amounts payable by the director pursuant to an agreement under any federal law providing for compensation, assistance, or allowances with respect to unemployment.

(f) This section applies only if appropriate arrangements have been made for reimbursement by the state or local child support enforcement agency for the administrative costs incurred by the director under this section which are attributable to child support obligations being enforced by the state or local child support enforcement agency.

(g)(1) The term “child support obligations” is defined for purposes of these provisions as including only obligations which are being enforced pursuant to a plan described in § 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under Part D of Title IV of the Social Security Act.

(2) The term “state or local child support enforcement agency” as used in this chapter means any agency of this state or a political subdivision thereof operating pursuant to a plan described in subdivision (g)(1) of this section.

History. Acts 1941, No. 391, § 15; 1981 (Ex. Sess.), No. 37, § 2; A.S.A. 1947, § 81-1118.

Cross References. Handling costs for withholding, § 16-110-417.

U.S. Code. Part D of Title IV of the

Social Security Act referred to in this section is codified as 42 U.S.C. § 651 et seq. Section 454 is codified as 42 U.S.C. § 654. Section 462 was repealed by Act Aug. 22, 1996, P.L. 104-193.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Legislative Survey, Business Law, 4 U. Ark. Little Rock L.J. 579.

CASE NOTES

Cited: Southwestern Bell Tel. Co. v. Thornbrough, 232 Ark. 929, 341 S.W.2d 1 (1960).

11-10-111. Protection of rights and benefits — Exception for withholding food stamp overages.

(a)(1) An individual filing a new claim for unemployment compensation shall at the time of filing the claim disclose whether or not he or she owes an uncollected overissuance, as defined in section 13(c)(1) of the Food Stamp Act of 1977, of food stamp coupons.

(2) The Director of the Department of Workforce Services shall notify the state food stamp agency enforcing the obligation of any individual who discloses that he or she owes a food stamp overage obligation and who is determined to be eligible for unemployment compensation.

(b) The director shall deduct and withhold from any unemployment compensation payable to an individual who owes an uncollected overissuance:

(1) The amount specified by the individual to the director to be deducted and withheld under this section;

(2) The amount, if any, determined pursuant to an agreement submitted to the state food stamp agency under section 13(c)(3)(A) of the Food Stamp Act of 1977; or

(3) Any amount otherwise required to be deducted and withheld from unemployment compensation pursuant to section 13(c)(3)(B) of the Food Stamp Act of 1997.

(c) Any amount deducted and withheld under this section shall be paid by the director to the food stamp program administered by the Division of County Operations of the Department of Human Services.

(d) Any amount deducted and withheld under subsection (b) of this section shall for all purposes be treated as if it were paid to the individual as unemployment compensation and paid by the individual to the Department of Human Services as repayment of the individual's uncollected food stamp overissuance.

(e) For purposes of this section, the term "unemployment compensation" means any compensation payable under this act, including amounts payable by the director pursuant to an agreement under any federal law providing for compensation, assistance, or allowances with respect to unemployment.

(f) This section applies only after an agreement has been made for reimbursement by the department for the administrative costs incurred by the director under this section which are attributable to the repayment of uncollected food stamp overissuances.

History. Acts 1997, No. 234, § 1.

A.C.R.C. Notes. The food stamp program, which is administered by the Division of County Operations of the Department of Human Services, is a federal program. The program is now referred to as the "Supplemental Nutrition Assistance Program", is codified as 7 U.S.C. § 2011 et seq.

Meaning of "this act". Acts 1997, No.

234, codified as §§ 11-10-111, 11-10-201, 11-10-208, 11-10-210, 11-10-305, 11-10-308, 11-10-314, 11-10-513, 11-10-515, 11-10-522 — 11-10-524, 11-10-526, 11-10-529, 11-10-532, 11-10-703, 11-10-705, 11-10-706, 11-10-717, 11-10-719, 11-10-801, 11-10-802.

U.S. Code. Section 13 of the Food Stamp Act of 1977, referred to in this section, is codified as 7 U.S.C. § 2022.

SUBCHAPTER 2 — DEFINITIONS

SECTION.

11-10-201. Base period.
 11-10-202. Regular benefits.
 11-10-203. Benefit year.
 11-10-204. Contributions.
 11-10-205. Calendar quarter.
 11-10-206. Director.
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SECTION.

11-10-214. Unemployment.
 11-10-215. Wages.
 11-10-216. Week.
 11-10-217. Insured work.
 11-10-218. Rate year.
 11-10-219. Computation date.
 11-10-220. Educational institutions.
 11-10-221. Hospital.
 11-10-222. United States.
 11-10-223. Supplemental benefit payments.
 11-10-224. References to gender.
 11-10-225. American vessel.
 11-10-226. American aircraft.

SECTION.

11-10-227. Treatment of Indian tribes.

Effective Dates. Acts 1943, No. 110, § 2: effective on adoption. Approved Feb. 26, 1943.

Acts 1949, No. 129, § 2: Feb. 21, 1949. Emergency clause provided: "It is hereby ascertained and declared that a grave injustice is being done by compelling payment of Unemployment Compensation Tax on real estate commission salesmen where no benefits can be derived from same and this unjust situation should be corrected immediately and an emergency is hereby declared to exist and this Act shall take effect and be in force from and after its passage and approval."

Acts 1955, No. 395, § 30: July 1, 1955.

Acts 1963, No. 93, § 13: July 1, 1963.

Acts 1971, No. 35, § 25: approved Feb. 3, 1971. Emergency clause provided: "It is determined by the General Assembly of the State of Arkansas that an unemployment crisis exists in this State and in order to give better protection to the unemployed and their families extended benefits of the unemployment insurance program should be made available and to alleviate as much as possible the suffering and distress caused by unemployment, it is necessary to work in cooperation with the federal government; and in order to receive the benefits of federal law and comply with the mandate of the United States Congress as provided in United States Public Law 91-373, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety, this Act shall take effect and be in force from and after its passage."

Acts 1973, No. 329, § 14: Mar. 14, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Employment Security laws of the State are in need of immediate clarification and revision in order to provide adequate protection to the working and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preser-

vation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 609, § 19: Mar. 28, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State are in need of immediate clarification and revision in order to provide adequate protection to the working and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1083, § 14: Jan. 30, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State of Arkansas are in need of immediate clarification and revision in order to provide adequate protection to the citizens of this State when they experience a period of unemployment and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1977, No. 366, § 14: Mar. 17, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State are in need of immediate clarification and revision in order to provide adequate protection to the employed and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and

safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1977, No. 376, § 21: approved Mar. 8, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to receive the benefits of Federal law and to comply with the mandate of the United States Congress as provided in United States Public Law 94-566 and in order to give better protection to the unemployed workers and their families, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, this Act shall take effect and be in force from and after its passage."

Acts 1979, No. 492, § 18: Mar. 21, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to clarify certain provisions of the Employment Security Law that may be subject to misinterpretation and in order to bring the said Employment Security Law into conformity with the Federal Unemployment Tax Act as amended by P. L. 94-566, P. L. 95-19, and P. L. 95-216 so that Arkansas employers and workers may receive the benefits of the said Federal Unemployment Tax Act, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall take effect and be in full force and effect from and after its passage and approval."

Acts 1979, No. 922, § 18: Apr. 16, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to clarify certain provisions of the Employment Security Law into conformity with the Federal Unemployment Tax Act as amended by P. L. 94-566, P. L. 95-19, and P. L. 95-216 so that Arkansas employers and workers may receive the benefits of the said Federal Unemployment Tax Act, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1981, No. 43, § 22: Feb. 10, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to restore and insure

solvency to the State's unemployment insurance trust fund from which unemployment benefits are paid to unemployed Arkansas workers and in order to bring the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 96-364 and P.L. 96-499 and with P.L. 95-524, 96-249 and 96-265 so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1983, No. 482, § 41: Mar. 16, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to conform with P.L. 97-300 and to bring the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 97-248 and to insure the future solvency of the unemployment insurance fund so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1985, Nos. 8,9, § 34: Jan. 30, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended by P.L. 98-21 and P.L. 98-369, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1987, No. 672, § 13: Apr. 7, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1083 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 753, § 30: July 1, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections to the Shared Work plan provisions which enable employers to avoid layoffs and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1987."

Acts 1989, No. 420, § 17: Mar. 8, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections, and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall take

effect and be in full force after its passage and approval."

Acts 1991, No. 48, § 13: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1991."

Acts 1991, No. 100, § 58: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of this act should become effective at the beginning of the next fiscal year; that the next fiscal year begins on July 1, 1991 and this act may not go into effect until after July 1, 1991 unless an emergency is declared. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

Acts 1993, No. 6, § 21: Feb. 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in

full force and effect from and after its passage and approval."

Acts 1995, No. 519, § 14: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

Acts 1995, No. 581, § 5: Mar. 9, 1995. Emergency clause provided: "It is found and determined by the General Assembly that newspaper carriers have traditionally been considered to be independent contractors; that the Employment Security Department's interpretation of the laws concerning independent contractors has called into question whether many newspaper carriers are employees or independent contractors; that many small newspapers will be harmed, if newspaper carriers are interpreted to be employees; that this act exempts newspaper carriers from employment status; that this act is immediately necessary in order to preserve the independent contractor status of newspaper carriers and to avoid unnecessary harm to newspaper companies. Therefore an emergency is hereby declared to exist and this act, being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect upon passage and approval."

Acts 1997, No. 234, § 32: Feb. 21, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act,

as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1116, § 19: Apr. 5, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2001, No. 1467, § 7: Apr. 10, 2001. Emergency clause provided: "It is hereby found and determined by the Eighty-third General Assembly that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Fed-

eral Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 353, § 3: Mar. 13, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2003, No. 1223, § 15: Apr. 10, 2003. Emergency clause provided: "It is

found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Department into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2009, No. 802, § 14: Apr. 3, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible in order to assure the prompt determination of claims for unemployment benefits and the continued provision of benefits and services to eligible persons. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Trucker as employee or independent contractor for unemployment compensation. 2 A.L.R.4th 1219.

Am. Jur. 76 Am. Jur. 2d, Unemp. Comp., § 26, 35 et seq.

C.J.S. 81 C.J.S., Soc. Sec., etc., § 146 et seq.

CASE NOTES

Cited: Thornbrough v. Gage, 234 Ark. 15, 350 S.W.2d 306 (1961); Garrett v. Cline, 257 Ark. 829, 520 S.W.2d 281

(1975); Hirschy v. Everett, 8 Ark. App. 174, 649 S.W.2d 412 (1983); Barker v. Stiles, 9 Ark. App. 273, 658 S.W.2d 416

(1983); *Stiles v. Hopkins*, 282 Ark. 207, 666 S.W.2d 703 (1984).

11-10-201. Base period.

(a)(1) As used in this chapter, unless the context clearly requires otherwise, “base period” means the first four (4) of the last five (5) completed calendar quarters immediately preceding the first day of the benefit year.

(2) For claims involving wages of several states, the base period shall be that which is applicable under the unemployment insurance laws of the paying state.

(b)(1) If an individual lacks sufficient base-period wages because of a job-related injury for which he or she received workers’ compensation, an extended base period will be substituted for the current base period on a quarter-by-quarter basis as needed to establish a valid claim upon written application by the claimant.

(2) “Extended base period” means the four (4) quarters prior to the claimant’s base period. These four (4) quarters may be substituted for base period quarters on a quarter-by-quarter basis to establish a valid claim regardless of whether the wages have been used to establish a prior claim, except that any wages earned that would render the Department of Workforce Services out of compliance with applicable federal law will be excluded if used in a prior claim.

(3) Benefits paid on the basis of an extended base period, which would not otherwise be payable, shall be noncharged.

(c)(1) Beginning with initial claims filed on July 1, 2009, and thereafter, if an individual lacks sufficient base-period wages, an alternate base period shall be substituted for the current base period.

(2) “Alternate base period” means the four (4) completed calendar quarters immediately preceding the first day of that benefit year.

History. Acts 1941, No. 391, § 2; 1947, 1947, § 81-1103; Acts 1997, No. 234, § 2; No. 398, § 1; 1973, No. 350, § 1; A.S.A. 2009, No. 802, § 1.

11-10-202. Regular benefits.

As used in this chapter, unless the context clearly requires otherwise, “regular benefits” means benefits payable to an individual under this chapter or under any other state law, including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. § 8501 et seq., other than extended benefits and additional benefits.

History. Acts 1941, No. 391, § 2; 1971, No. 35, § 1; 1973, No. 350, § 1; A.S.A. 1947, § 81-1103.

11-10-203. Benefit year.

As used in this chapter, unless the context clearly requires otherwise, “benefit year” with respect to any individual means the twelve-consecutive-month period beginning the first day of the calendar quarter in which he or she first files a valid claim for benefits in accordance with § 11-10-521. For claims involving the wages of several states, the benefit year shall be that which is applicable under the unemployment insurance law of the paying state.

History. Acts 1941, No. 391, § 2; 1947, No. 398, § 1; 1973, No. 350, § 1; A.S.A. 1947, § 81-1103.

11-10-204. Contributions.

As used in this chapter, unless the context clearly requires otherwise:

(1) “Contributions” means money payments required by this chapter to be made into the Unemployment Compensation Fund by any employing unit on account of having individuals in its employ; and

(2) “Payments in lieu of contributions” means the money payments made pursuant to the provisions of § 11-10-713.

History. Acts 1941, No. 391, § 2; 1973, No. 350, § 1; A.S.A. 1947, § 81-1103.

11-10-205. Calendar quarter.

As used in this chapter, unless the context clearly requires otherwise, “calendar quarter” means the period of three (3) consecutive calendar months ending on March 31, June 30, September 30, or December 31.

History. Acts 1941, No. 391, § 2; A.S.A. 1947, § 81-1103.

11-10-206. Director.

As used in this chapter, unless the context clearly requires otherwise, “director” means the Director of the Department of Workforce Services.

History. Acts 1941, No. 391, § 2; 1955, No. 395, § 1; 1977, No. 366, § 2; A.S.A. 1947, § 81-1103; Acts 1991, No. 100, § 2.

11-10-207. Regulations.

All regulations previously promulgated under this chapter shall be enforceable by the Director of the Department of Workforce Services and shall remain in full force and effect unless or until such time as amended by the director.

History. Acts 1941, No. 391, § 2; 1955, No. 395, § 1; 1977, No. 366, § 2; A.S.A. 1947, § 81-1103; Acts 1991, No. 100, § 3.

11-10-208. Employing unit.

(a)(1) As used in this chapter, unless the context clearly requires otherwise, “employing unit” means any individual, organization, or legal representative of a deceased person.

(2) This term includes but is not limited to any partnership, association, trust, estate, joint-stock company, insurance company, or corporation, whether domestic or foreign, and the receiver, trustee in bankruptcy, trustee, or successor of any of the foregoing which has had one (1) or more individuals performing services for it within this state.

(3) “Employing unit” shall also mean the state or any agency, board, commission, department, institution, or instrumentality of the state and any political subdivision of the state and any instrumentality of any political subdivision of the state, any instrumentality of more than one (1) of the foregoing, any instrumentality of the foregoing and one (1) or more other states or political subdivisions, which has had one (1) or more individuals performing services for it.

(b)(1) All individuals performing services within this state for any employing unit which maintains two (2) or more separate establishments within this state shall be deemed to be performing services for a single employing unit for all the purposes of this chapter.

(2) Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit shall be deemed to be engaged by the employing unit for all the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or the person, provided that the employing unit had actual or constructive knowledge of the work.

(c)(1) Any employer may on or before December 1 prior to the year the application is to become effective make application in writing to the Department of Workforce Services to participate in a joint account with one (1) or more other employers.

(2) The department shall approve those applications that meet the requirements of this section.

(3) Any application to participate in a joint account may be filed on or before December 1 prior to the year the membership is to become effective, provided, however, all contributions, interest, and penalties due from the applicant-employer must be paid prior to the effective date of the employer’s membership in the joint account.

(4) All such applications shall be accepted only on the condition that the applicant waive all rights he or she has in his or her individual employer account under the law when the department approves his or her application and merges his or her individual account into a joint account for experience-rating purposes.

(5) Each applicant-employer shall agree to assume joint and several liability for any contributions, interest, and penalties accruing on the

part of any one (1) of the employers participating in the joint account during the duration of the account in consideration for the department's granting the applicant-employer the right to participate in it.

(6) Each employer participating in a joint account agrees to maintain a sufficient record of the employee's own employment in order that the employer can furnish the department with information necessary to enable the department to make proper certification to the Internal Revenue Service under the Federal Unemployment Tax Act and to enable the department to determine any benefit charges against the employee's separate account.

(7) No reduced rate of contributions shall be established for any joint account until each participating employer is individually eligible for the calculation of a contribution rate.

(8) All joint accounts will be maintained only on a calendar-year basis, and joint accounts must be maintained for a minimum period of two (2) calendar years unless terminated sooner by action of the department.

(9) All contribution credits for all employers in a joint account will be calculated together. All benefit payments chargeable against all employers in a joint account will be calculated together. The average annual payroll of the joint account will be the average of the annual payrolls of all employers participating in the account.

(10) If any individual, type of organization, or employing unit succeeds to the business of an employer participating in a joint account under conditions which would require the transfer of any separate account of that employer to the successor, the successor shall be ipso facto a member of the joint account.

(11)(A) Withdrawal from a joint account by any participating employer may be approved if the request for withdrawal is made in writing to the department on or before September 30 of the year prior to the year for which the withdrawal is to be effective.

(B) The withdrawing employer shall as of the effective date of withdrawal be treated in all respects as a newly liable employer regardless of all prior contributions or benefit payment experience.

(C) The remaining employer or employers shall continue to constitute the joint account. The withdrawal or termination of all except one (1) member shall not dissolve such joint account unless and until such last member shall withdraw or terminate.

(12) Participation in a joint account shall not affect the right of any employer to terminate the employer's liability, but after termination, the employer shall in all respects be treated as a withdrawing employer under this section.

History. Acts 1941, No. 391, § 2; 1971, No. 35, § 2; 1977, No. 376, § 1; A.S.A. 1947, § 81-1103; Acts 1997, No. 234, § 3.

U.S. Code. The reference to the Federal Unemployment Tax Act may be to the

Federal Unemployment Tax Act of 1939 or the Federal Unemployment Tax Act of 1954. Both are codified as 26 U.S.C. § 3301 et seq.

CASE NOTES

ANALYSIS

Contractors.
Fraternal Organizations.
Religious Organizations.
Trusts.

Contractors.

Company hiring contractors held not to be "employing unit" or "employer" of contractors' employees. *Crossett Lumber Co. v. McCain*, 205 Ark. 631, 170 S.W.2d 64 (1943), superseded by statute as stated in, *Morris v. Everett*, 647 S.W.2d 476 (1983) (decision under prior law).

Fraternal Organizations.

Lodge held to be an employing unit. *Bland v. Belle Point Lodge*, 235 Ark. 331, 359 S.W.2d 804 (1962).

11-10-209. Employer.

As used in this chapter, unless the context clearly requires otherwise, "employer" means:

(1) Any individual or employing unit which, for some portion of ten (10) or more days, whether the days are or were consecutive, within the current or the preceding calendar year, has or had in employment one (1) or more individuals irrespective of whether the same individuals are or were employed in each day;

(2) Any employing unit for which service in employment as defined in § 11-10-210(a)(2) is performed, except as provided in subdivision (5) of this section;

(3) Any employing unit which is a nonprofit organization and for which service in employment includes, but is not limited to, service in employment as defined in § 11-10-210(a)(3), except as provided in subdivisions (4)(B) and (5)(B) of this section;

(4)(A) Any employing unit for which agricultural labor as defined in § 11-10-210(a)(5) is performed.

(B) In determining whether or not an employing unit for which service other than agricultural labor is also performed is an employer under subdivision (1)-(3) or subdivision (5)(A) of this section, the wages earned or the employment of an employee performing service in agricultural labor shall not be taken into account. If an employing unit is determined an employer of agricultural labor, the employing unit shall be determined an employer for the purposes of subdivision (1) of this section;

(5)(A) Any employing unit for which domestic service in employment as defined in § 11-10-210(a)(6) is performed.

(B) In determining whether or not an employing unit for which service other than domestic service is also performed is an employer

Religious Organizations.

The employees of charitable, nonprofit medical center, organized and operated by a religious order of Catholic sisters could not be deemed employees of the Catholic Church pursuant to subsection (2). *St. Vincent Infirmary Medical Ctr. v. Director of Labor*, 32 Ark. App. 71, 797 S.W.2d 460 (1990).

Trusts.

Religious trust held to be an employing unit. *Employment Sec. Div. v. Shiloh Trust*, 249 Ark. 429, 460 S.W.2d 66 (1970).

- under subdivisions (1)-(4)(A) of this section, the wages earned or the employment of an employee performing domestic service shall not be taken into account;
- (6) Any individual or employing unit which acquired the organization, trade, or business, or substantially all of the assets thereof, of another which at the time of the acquisition was an employer subject to this chapter;
- (7) Any individual or employing unit that acquired the organization, trade, or business, or substantially all the assets thereof, of another employing unit, if the employment record of the individual or employing unit subsequent to the acquisition, together with the employment record of the acquired unit prior to the acquisition, both within the same calendar year, would be sufficient to constitute an employing unit an employer under subdivision (1) of this section;
- (8) Any employing unit not an employer by reason of any other subdivision of this section:
- (A) For which, within either the current or preceding calendar year, service is or was performed with respect to which the employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund; or
- (B) Which, as a condition for approval of this chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required pursuant to the act to be an employer under this chapter;
- (9) For the effective period of its election pursuant to § 11-10-403, any employing unit which has elected to become subject to this chapter;
- (10) For the purposes of subdivisions (1) and (3) of this section, employment shall include service that would constitute employment but for the fact that the service is deemed to be performed entirely within another state pursuant to an election under an arrangement entered into, in accordance with § 11-10-544(a), by the Director of the Department of Workforce Services and any agency charged with the administration of any other state or federal unemployment compensation law.

History. Acts 1941, No. 391, § 2; 1971, No. 35, § 2; 1973, No. 329, § 1; 1977, No. 366, § 2; 1977, No. 376, § 2; A.S.A. 1947, § 81-1103; Acts 2011, No. 980, § 4.

Amendments. The 2011 amendment inserted present (4)(B); redesignated for-

mer (4)(B) as (5)(A) and former (5)(A) as (5)(B); and deleted former (5)(B).

U.S. Code. The Federal Unemployment Tax Act referred to in this section is codified as 26 U.S.C. § 3301 et seq.

CASE NOTES

ANALYSIS	Number of Employees.
Purpose. Contractors. Exemptions. Fraternal Organizations.	Purpose. This chapter is founded upon the employer-employee relationship, absent which it does not apply; there is nothing in

it to indicate a legislative intent to destroy the independent contractor concept of existing law or to subject to its terms any other relation than that of master and servant or employer and employee. *Crossett Lumber Co. v. McCain*, 205 Ark. 631, 170 S.W.2d 64 (1943), superseded by statute as stated in, *Morris v. Everett*, 647 S.W.2d 476 (1983) (decision under prior law).

Contractors.

Employees held not to be independent contractors and company hiring them held to be their "employer." *McKinley v. R.L. Payne & Son Lumber Co.*, 200 Ark. 1114, 143 S.W.2d 38 (1940) (decision under prior law); *Morris v. Everett*, 647 S.W.2d 476 (1983).

Company hiring contractors held not to be "employer" of contractors' employees. *Southern Kraft Corp. v. McCain*, 205 Ark. 943, 171 S.W.2d 947 (1943).

11-10-210. Employment.

(a) As used in this chapter, unless the context clearly requires otherwise, "employment" means:

(1) Service performed after December 31, 1977, including service in interstate commerce, by:

(A) Any officer of a corporation;

(B) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(C) Any individual other than an individual who is an employee under subdivision (a)(1)(A) or (B) of this section who performs services for remuneration for any person:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry-cleaning services, for his or her principal; or

(ii) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his or her principal, except for sideline sales activities on behalf of some other person, of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

(iii) Provided that for purposes of subdivision (a)(1)(C) of this section, the term "employment" shall include services described in subdivisions (a)(1)(C)(i) and (ii) of this section only if:

(a) The contract of service contemplates that substantially all of the services are to be performed personally by the individual;

Exemptions.

An employer under this section is liable for the tax unless it comes within one of the exemption provisions, the burden of proving such being upon the employer. *Bland v. Belle Point Lodge*, 235 Ark. 331, 359 S.W.2d 804 (1962).

Fraternal Organizations.

Lodge held to be employer. *Bland v. Belle Point Lodge*, 235 Ark. 331, 359 S.W.2d 804 (1962).

Number of Employees.

Although the federal statute defines an employer as one who has four or more individuals in his employment, the state of Arkansas had the right and power to make the chapter apply to the employer of only one individual. *Bland v. Belle Point Lodge*, 235 Ark. 331, 359 S.W.2d 804 (1962).

(b) The individual does not have a substantial investment in facilities used in connection with the performance of the services, other than in facilities for transportation; and

(c) The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed;

(2) Service performed:

(A) By an individual in the employ of this state or any of its instrumentalities, or in the employ of this state and one (1) or more states or their instrumentalities; and

(B) In the employ of any political subdivision of this state or any instrumentality of any one (1) or more of the political subdivisions, or any instrumentality of this state or any of its political subdivisions and one (1) or more other states or political subdivisions. Provided that the service is excluded from "employment" as defined in the Federal Unemployment Tax Act by § 3306(c)(7) of that act and is not excluded from "employment" under subdivision (a)(4) of this section;

(3) Service performed by an individual in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) of the Internal Revenue Code of 1954 if the organization had one (1) or more individuals in employment for some portion of a day in each of ten (10) different days, whether or not the days were consecutive, within the current or preceding calendar year irrespective of whether the same individuals are or were employed in each day;

(4) For the purposes of subdivisions (a)(2) and (3) of this section, the term "employment" does not apply to service performed:

(A) In the employ of:

(i) A church or convention or association of churches; or

(ii) An organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(B) By a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry or by a member of a religious order in the exercise of duties required by the order;

(C) In the employ of a governmental entity referred to in subdivision (a)(2) of this section if the service is performed by an individual in the exercise of duties:

(i) As an elected official;

(ii) As a member of a legislative body or a member of the judiciary of a state or political subdivision;

(iii) As a member of the Arkansas Army National Guard or the Arkansas Air National Guard;

(iv) In a position which under or pursuant to the laws of this state is designated as a major nontenured policymaking or advisory position or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight (8) hours per week;

(v) During any calendar year beginning on and after January 1, 1999, as an election official or election worker if the amount of the

remuneration received by the individual during the calendar year is less than one thousand dollars (\$1,000);

(D) In a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or for the purpose of providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed into the competitive labor market, by an individual receiving the rehabilitation or remunerative work;

(E) As part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving the work relief or work training;

(F) By an inmate of a custodial or penal institution; or

(G) Beginning on and after July 1, 1999, by a person committed to a penal institution;

(5) Service performed by an individual in agricultural labor as defined in subdivision (f)(1) of this section when:

(A) The service is performed for a person who:

(i) During any calendar quarter in either the current or the preceding calendar year paid remuneration in cash of twenty thousand dollars (\$20,000) or more to individuals employed in agricultural labor; or

(ii) For some portion of a day in each of twenty (20) different calendar weeks, whether or not the weeks were consecutive, in either the current or preceding calendar year, employed in agricultural labor ten (10) or more individuals, regardless of whether they were employed at the same moment of time;

(B) For the purposes of this subdivision (a)(5), any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated as an employee of the crew leader:

(i) If the crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act of 1983 or substantially all the members of the crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by the crew leader; and

(ii) If the individual is not an employee of the other person within the meaning of subdivision (a)(1) of this section;

(C) For the purposes of this subdivision (a)(5), in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of that crew leader under subdivision (a)(5)(B) of this section:

(i) The other person and not the crew leader shall be treated as the employer of the individual; and

(ii) The other person shall be treated as having paid cash remuneration to the individual in an amount equal to the amount of cash

remuneration paid to the individual by the crew leader, either on his or her own behalf or on behalf of the other person, for the service in agricultural labor performed for the other person;

(D) For the purposes of this subdivision (a)(5), the term “crew leader” means an individual who:

(i) Furnishes individuals to perform service in agricultural labor for any other person;

(ii) Pays, either on his or her own behalf or on behalf of the other person, the individuals so furnished by him or her for the service in agricultural labor performed by them; and

(iii) Has not entered into a written agreement with the other person under which the individual is designated as an employee of the other person;

(6) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority if performed for an employing unit which paid cash remuneration of one thousand dollars (\$1,000) or more to individuals employed in domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(7) Service of an individual who is a citizen of the United States, performed outside the United States, except in Canada, or in the case of the Virgin Islands, in the employ of an American employer, other than service which is deemed employment under the provisions of subsections (b) and (c) of this section or the parallel provisions of another state’s law, if:

(A) The employer’s principal place of business in the United States is located in this state;

(B) The employer has no place of business in the United States, but:

(i) The employer is an individual who is a resident of this state;

(ii) The employer is a corporation which is organized under the laws of this state; or

(iii) The employer is a partnership or a trust and the number of partners or trustees who are residents of this state is greater than the number who are residents of any one (1) other state;

(C) None of the criteria of subdivision (a)(7)(A) or (B) of this section are met, but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on the service, under the law of this state; or

(D) An “American employer” for purposes of this section means a person who is:

(i) An individual who is a resident of the United States;

(ii) A partnership, if two-thirds ($\frac{2}{3}$) or more of the partners are residents of the United States;

(iii) A trust, if all of the trustees are residents of the United States; or

(iv) A corporation organized under the laws of the United States or of any state;

(8) Notwithstanding subsection (b) of this section, all service performed by an officer or member of the crew of an American vessel on or in connection with the vessel if the operating office from which the operations of the vessel operating on navigable waters within or without the United States are ordinarily and regularly supervised, managed, directed, and controlled is within this state; and

(9) Notwithstanding any other provisions of this section, service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act is required to be covered under this chapter.

(b) The term "employment" shall include an individual's entire service performed within or both within and without this state if the service is localized in this state. Service shall be deemed to be localized within a state if:

(1) The service is performed entirely within the state; or

(2) The service is performed both within and without the state but the service performed without the state is incidental to the individual's service within the state, for example, service that is temporary or transitory in nature or consists of isolated transactions.

(c) The term "employment" shall include an individual's entire service performed within, or both within and without, this state if the service is not localized in any state but some of the service is performed in this state and:

(1) The individual's base of operations is in this state; or

(2) If there is no base of operations, then the place from which the service is directed or controlled is in this state; or

(3) The individual's base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state;

(4) The term "employment" shall also include an individual's service, wherever performed within the United States, the Virgin Islands, or Canada, if:

(A) Such service is not covered under the unemployment compensation law of any other state, the Virgin Islands, or Canada; and

(B) The place from which the service is directed or controlled is in this state.

(d) Service covered by an election pursuant to § 11-10-403 and service covered by an election duly approved by the Director of the Department of Workforce Services in accordance with an arrangement pursuant to § 11-10-544 shall be deemed to be employment during the effective period of the election.

(e) Service performed by an individual for wages shall be deemed to be employment subject to this chapter irrespective of whether the common law relationship of master and servant exists, unless and until it is shown to the satisfaction of the director that:

(1) Such individual has been and will continue to be free from control and direction in connection with the performance of the service, both under his or her contract for the performance of service and in fact;

(2) The service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

(3) The individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

(f) The term "employment" shall not include:

(1) Service performed by an individual in agricultural labor, except as provided in subdivision (a)(5) of this section. For purposes of this subdivision (f)(1), the term "agricultural labor" means any service performed which was agricultural labor as defined in this subsection prior to January 1, 1972, and remunerated service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of the farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane if the major part of the service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in section 15(g) of the Agricultural Marketing Act or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D)(i) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity, but only if the operator produced more than one-half ($\frac{1}{2}$) of the commodity with respect to which the service is performed.

(ii) In the employ of a group of operators of farms, or a cooperative organization of which the operators are members, in the performance of service described in subdivision (f)(1)(D)(i) of this section, but only if the operators produced more than one-half ($\frac{1}{2}$) of the commodity with respect to which the service is performed.

(iii) The provisions of subdivisions (f)(1)(D)(i) and (ii) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(E) On a farm operated for profit if the service is not in the course of the employer's trade or business. As used in this subdivision (f)(1), the term "farm" includes stock, dairy, poultry, fruit, furbearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards;

(2) Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority unless performed for an employing unit that paid cash remuneration of one thousand dollars (\$1,000) or more to individuals employed in domestic service in any calendar quarter in the calendar year or the preceding calendar year;

(3) Service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for the service is fifty dollars (\$50.00) or more and the service is performed by an individual who is regularly employed by the employer to perform the service. For purposes of this section, an individual shall be deemed to be regularly employed by an employer during a calendar quarter only if:

(A) On each of some twenty-four (24) days during the quarter, the individual performs for the employer for some portion of the day service not in the course of the employer's trade or business; or

(B) The individual was regularly employed as determined under subdivision (f)(3)(A) of this section by the employer in the performance of the service during the preceding calendar quarter;

(4) Service performed on or in connection with a vessel or aircraft not an American vessel or American aircraft if the employee is employed on and in connection with the vessel or aircraft when outside the United States;

(5) Service performed by an individual in the employ of his or her son, daughter, or spouse, and service performed by a child under the age of twenty-one (21) years in the employ of his or her father or mother;

(6) Service performed in the employ of the United States Government or of an instrumentality of the United States which is:

(A) Wholly or partially owned by the United States; or

(B) Exempt from the tax imposed by section 3301 of the Federal Unemployment Tax Act by virtue of any provision of law which specifically refers to that section or the corresponding section of prior law in granting the exemption;

(7) Service performed in the employ of any political subdivision of the state or any instrumentality of any political subdivision which is wholly owned by one (1) or more political subdivisions of the state;

(8) Service performed by an individual for any political caucus, committee, headquarters, or other groups of like nature not established on a permanent basis;

(9) Service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act;

(10)(A) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the

Internal Revenue Code of 1954, other than an organization described in section 401(a) or under section 521 of the Internal Revenue Code of 1954 if the remuneration for the service is less than fifty dollars (\$50.00);

(B) Service performed by an individual under the age of twenty-two (22) years who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution, which combines academic instruction with work experience, if the service is an integral part of the program and the institution has so certified to the employer, except that this subdivision shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(C) Service performed in the employ of a school, college, or university if the service is performed by a student who is enrolled and is regularly attending classes at the school, college, or university; or

(D) Service performed in the employ of a hospital if the service is performed by a patient of the hospital as defined in § 11-10-221;

(11) Service performed in the employ of a foreign government, including service as a consular or other officer or employee or a nondiplomatic representative;

(12) Service performed in the employ of an instrumentality wholly owned by a foreign government:

(A) If the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and

(B) If the United States Secretary of State shall certify to the United States Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof;

(13) Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to state law and service performed as an intern in the employ of a hospital by an individual who has completed a four-year course in a medical school chartered or approved pursuant to state law;

(14) Service performed by an individual for any person or employing unit as an insurance agent or as an insurance solicitor if all service performed by the individual for the person or employing unit is performed for remuneration solely by way of commission;

(15) Any service performed by an individual for any person or employing unit as a real estate agent or as a real estate solicitor or salesman if all service performed by the individual for the person or employing unit is performed for remuneration solely by way of commission;

(16)(A) Service performed by an individual in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution, provided that the service does not constitute employment performed by an employee under the Federal Unemployment Tax Act;

(B) Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him or her at a fixed price, his or her compensation being based on the retention of the excess of the price over the amount at which the newspapers or magazines are charged to him or her, whether or not he or she is guaranteed a minimum amount of compensation for the service or is entitled to be credited with the unsold newspapers or magazines turned back;

(17) Service performed in the employ of an international organization;

(18) Service performed by an individual in or as an officer or member of the crew of a vessel while it is engaged in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweed, or other aquatic forms of animal and vegetable life, including service performed by any such individual as an ordinary incident to any such activity, except:

(A) Service performed in connection with the catching or taking of salmon or halibut for commercial purposes; and

(B) Service performed on or in connection with a vessel of more than ten (10) net tons, determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States;

(19) Service that is performed by a nonresident alien individual for the period that he or she is temporarily present in the United States as a nonimmigrant under subparagraph (F) or (J) of section 101(a)(15) of the Immigration and Nationality Act and which is performed to carry out the purpose specified in subparagraph (F) or (J), as the case may be; or

(20) Service performed by a person committed to a penal institution.

(g) If the services performed during one-half ($\frac{1}{2}$) or more of any pay period by an individual for any person or employing unit employing him or her constitute employment, all the services of the individual for the period shall be deemed to be employment, but if the services performed during more than one-half ($\frac{1}{2}$) of any pay period by an individual for any person or employing unit employing him or her do not constitute employment, then none of the services of the individual for the period shall be deemed to be employment. As used in this section, the term "pay period" means a period of not more than thirty-one (31) consecutive days for which a payment or remuneration is ordinarily made to the individual by any person or employing unit employing him or her.

History. Acts 1941, No. 391, § 2; 1943, No. 110, § 1; 1947, No. 398, § 1; 1949, No. 129, § 1; 1949, No. 155, § 2; 1955, No. 395, §§ 2, 3; 1963, No. 93, § 1; 1963, No. 104, § 1; 1965, No. 551, § 1; 1971, No. 35, § 3; 1973, No. 65, § 1; 1973, No. 329, §§ 2, 3, 4, 12; 1975, No. 609, § 1; 1975 (Extended Sess., 1976), No. 1083, §§ 2, 3; 1977, No. 376, §§ 3, 4; 1979, No. 492, §§ 1-3; 1979, No. 922, §§ 1-3; 1983, No. 482, §§ 1-3; 1985, No. 8, § 1; 1985, No. 9, § 1; A.S.A. 1947, § 81-1103; reen. Acts 1987, No. 672, § 2; Acts 1987, No. 753, § 1; 1995, No. 581, § 1; 1997, No. 234, § 4; 1999, No. 1116, §§ 3-5; 2003, No. 1223, § 1.

A.C.R.C. Notes. Part of this section was reenacted by Acts 1987, No. 672, § 2. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in

the event of conflict.

Acts 1995, No. 581 was passed over the Governor's veto on March 9, 1995.

U.S. Code. Section 3306(c)(7) of the Federal Unemployment Tax Act referred to in this section is codified as 26 U.S.C. § 3306(c)(7). The Migrant and Seasonal Agricultural Worker Protection Act of 1983 is codified as 29 U.S.C. § 1801 et seq. The Agricultural Marketing Act is codified as 12 U.S.C. § 1141 et seq. Section 3301 of the Federal Unemployment Tax Act is codified as 26 U.S.C. § 3301. Section 1 of the Railroad Unemployment Insurance Act is codified as 45 U.S.C. § 351. Sections 401, 501, and 521 of the Internal Revenue Code are codified as 26 U.S.C. §§ 401, 501, and 521, respectively. Subparagraph (F) and (J) of § 101(a)(15) of the Immigration and Nationality Act are codified as 8 U.S.C. § 1101(a)(15)(F) and (a)(15)(J), respectively.

RESEARCH REFERENCES

Ark. L. Rev. Recent Development: Ark. Code Ann. § 11-10-210(e) — Place of Business (Mamo Transp., Inc. v. Williams, — S.W.3d —, No. 08-29, 2008 WL 4889533 (Ark. Nov. 13, 2008)), 61 Ark. L. Rev. 787.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS

Construction.
Appellate Review.
Definitions.
Governmental Agencies.
Independent Contractors.
Product Demonstrators.
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Religious, Charitable, Etc., Organizations.
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Construction.

In making the determination of whether remuneration is paid, subsection (e) of this section must be construed strictly against the state with any doubts being resolved in favor of the taxpayer. Home Care Prof'ls of Ark., Inc. v. Williams, 95 Ark. App. 194, 235 S.W.3d 536 (2006).

Appellate Review.

Agricultural activities exempted from the section are limited to those performed in the employ of an owner or tenant operating a farm as specified therein and the activities are not exempt when performed in the employ of other persons. Arkansas Valley Indus., Inc. v. Laney, 242 Ark. 261, 412 S.W.2d 817 (1967); Hanford Produce Co. v. Clemmons, 242 Ark. 240, 412 S.W.2d 828 (1967).

Evidence sufficient to find that corporation was not engaged in agricultural employment. Arkansas Valley Indus., Inc. v. Laney, 242 Ark. 261, 412 S.W.2d 817 (1967); Hanford Produce Co. v. Clemmons, 242 Ark. 240, 412 S.W.2d 828 (1967).

On appeal, the findings of fact of the Board of Review are conclusive if supported by substantial evidence; appellate court review is limited to determining whether the Board could reasonably reach its decision upon the evidence before it, viewing the evidence and all reasonable

inferences deducible therefrom in the light most favorable to the Board's findings. *Rodriguez v. Director, Ark. Emp. Sec. Dep't*, 59 Ark. App. 8, 952 S.W.2d 186 (1997).

Home care company was liable for unemployment insurance taxes based on its caregivers' remunerations where the company failed to satisfy the second exemption requirement in subsection (e) of this section; the caregivers' represented the company's interest on clients' premises, not just in a tangential fashion, but in the most direct sense, that of performing the very service by which the company profited. *Home Care Prof'ls of Ark., Inc. v. Williams*, 95 Ark. App. 194, 235 S.W.3d 536 (2006).

Definitions.

The word "primarily" as used in this section means "of first importance" or "principally." *St. Vincent Infirmary Medical Ctr. v. Director of Labor*, 32 Ark. App. 71, 797 S.W.2d 460 (1990).

In regard to the place of business aspect of the second part of the test in subsection (e) of this section, an employer's place of business has been found to include not only the location of a business's office but the entire area in which a business conducts business; more specifically, the representation of an entity's interest by an individual on a premises renders the premises a place of the employer's business. *Home Care Prof'ls of Ark., Inc. v. Williams*, 95 Ark. App. 194, 235 S.W.3d 536 (2006).

As the employer's place of business was its dispatch offices and the location of the transport vehicles under this section, the Board of Review of the Arkansas Department of Workforce Services properly determined that the employer was required to pay unemployment insurance taxes; "place of business" was the place where the enterprise was performed. *Mamo Transp., Inc. v. Williams*, 375 Ark. 97, 289 S.W.3d 79 (2008).

Governmental Agencies.

Business operated within the boundaries of a United States government reservation was subject to state unemployment compensation law and not exempted therefrom on ground that it was a governmental agency or instrumentality. *Buckstaff Bath House Co. v. McKinley*, 198 Ark.

91, 127 S.W.2d 802 (1939), *aff'd*, 308 U.S. 358, 60 S. Ct. 279 (1939) (decision under prior law).

Independent Contractors.

In establishing that contractor was independent contractor, it was not necessary to show that conditions mentioned as exceptions in subsection (e) were present unless three precedent conditions were found to exist: (1) that services were performed, (2) by an individual, (3) for wages. *McCain v. Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114 (1943).

Under subsection (e) the fact that the services must be rendered by an individual indicates that personal service was intended. *McCain v. Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114 (1943).

One whose income is determined by the profit or loss which he derives from his individual business cannot be said to be rendering services for wages within subsection (e), even though he is contributing his personal services to the enterprise. *McCain v. Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114 (1943).

Evidence sufficient to find that workers were independent contractors. *McCain v. Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114 (1943).

Evidence insufficient to find that workers were independent contractors. *Ice Serv. Co. v. Goss*, 213 Ark. 832, 212 S.W.2d 933 (1948); *Palmer v. Arkansas Emp. Sec. Div.*, 265 Ark. 571, 580 S.W.2d 683 (1979); *Morris v. Everett*, 647 S.W.2d 476 (1983); *American Transp. Corp. v. Director, Emp. Sec. Dep't*, 39 Ark. App. 104, 840 S.W.2d 198 (1992).

By its passage of the 1971 amendment to subsection (e), the General Assembly intended to make it more difficult to claim an exemption under this chapter; the amendment joined subdivisions (1)-(3) with the conjunction "and," thereby requiring a person to show all three before obtaining an exemption. *Morris v. Everett*, 647 S.W.2d 476 (1983).

Drivers of employer's trucks, which were leased to a broker, held to be employees for whom contributions were required under the Arkansas Employment Security Act; employer failed in her burden of proving that the drivers, who without dispute were providing services for wages, were independent contractors within the mean-

ing of subsection (e) of this section. *Stepherston v. Director*, 49 Ark. App. 52, 895 S.W.2d 950 (1995).

In order to obtain the exemption contained in subsection (e), it is necessary that the employer prove each of subdivisions (e)(1) through (3). *Network Design Eng'g, Inc. v. Director, Emp. Sec. Dep't*, 52 Ark. App. 193, 917 S.W.2d 168 (1996).

Engineering subcontractor's relationship to inspectors engaged pursuant to a form contract constituted covered employment subject to the payment of unemployment insurance taxes under subsection (e) of this section. *Network Design Eng'g, Inc. v. Director, Emp. Sec. Dep't*, 52 Ark. App. 193, 917 S.W.2d 168 (1996); *Ice Serv. Co. v. Goss*, 213 Ark. 832, 212 S.W.2d 933 (1948). See *Steinert v. Director, Ark. Emp. Sec. Dep't*, 64 Ark. App. 122, 979 S.W.2d 908 (1998).

Drive-away service had to pay unemployment taxes on the drivers it engaged because the drivers did not meet the second prong of subsection (e) of this section for finding that they were independent contractors. Delivery of vehicles was in the usual course of business, and regarding the "place of business" aspect of the test, the roadways were where services were performed, and the drivers represented the employer's interests on those roadways. *Mamo Transp., Inc. v. Dir., Dep't of Workforce Servs.*, 101 Ark. App. 68, 270 S.W.3d 379 (2007).

Product Demonstrators.

Food demonstrators were employees and, therefore, the employer was required to pay unemployment insurance taxes for them, notwithstanding that the demonstrators also performed similar work for other agencies, since such fact merely showed that the demonstrators obtained part time employment from more than one employer. *Barb's 3-D Demo Serv. v. Director, Ark. Empl. Sec. Dep't*, 69 Ark. App. 350, 13 S.W.3d 206 (2000).

Proof.

Burden of showing matters of exemption was placed upon the party seeking exemption. *McKinley v. R.L. Payne & Son Lumber Co.*, 200 Ark. 1114, 143 S.W.2d 38 (1940) (decision under prior law).

In order to obtain the exemption contained in subsection (e), it is necessary that the employer prove each of subdivi-

sions (e)(1) through (3); therefore, if there is sufficient evidence to support a finding that any one of the three requirements is not met, there is no exemption. *Stepherston v. Director*, 49 Ark. App. 52, 895 S.W.2d 950 (1995).

On a claim for unemployment compensation, the Director of the Arkansas Department of Workforce Services did not err in determining, pursuant to subsection (e) of this section, that appellant was an employer and that services performed by the claimant constituted employment because the claimant attended training classes, had an immediate supervisor, and was given specific assignments to perform. *West Land Servs. v. Dir., Ark. Dep't of Workforce Servs.*, 2012 Ark. App. 161, — S.W.3d — (2012).

Religious, Charitable, Etc., Organizations.

Where organization entirely failed to prove that it was organized and operated exclusively for religious, charitable, scientific or educational purposes, it failed to prove it came within one of the exemption provisions of the statute and was therefore liable for contributions under this chapter. *Bland v. Belle Point Lodge*, 235 Ark. 331, 359 S.W.2d 804 (1962).

The requirement that an organization be operated primarily for religious purposes in order to qualify for exemption cannot be read into subdivision (a)(4)(A)(i) since the section is written in the disjunctive rather than the conjunctive form. *National Baptist Convention, Inc. v. Arkansas Emp. Sec. Div.*, 3 Ark. App. 189, 623 S.W.2d 852 (1981), *aff'd*, 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982).

Although the legislature may not have intended to exempt organizations which are involved in commercial activities from the employment security laws, this section as written clearly exempts employment by a convention or association of churches from their application. *National Baptist Convention, Inc. v. Arkansas Emp. Sec. Div.*, 3 Ark. App. 189, 623 S.W.2d 852 (1981), *aff'd*, 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982).

The employees of a voluntary association of churches, which owned and operated non-religious property, were entitled to exemption from payment of employment security contributions on their wages, since under the language of that

subdivision the employees were employed by a convention or association of churches; the fact that the employees were paid from bank accounts which were segregated in name from those of the association was irrelevant. *National Baptist Convention, Inc. v. Arkansas Emp. Sec. Div.*, 3 Ark. App. 189, 623 S.W.2d 852 (1981), *aff'd*, 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982).

Pursuant to the evidence, three-member commission appointed by a religious convention to run a profit-making business, was not required to pay payroll taxes if the convention's own exemption was not applicable; accordingly, the convention was exempt from paying the payroll tax on the business. *Arkansas Employment Sec. Div. v. National Baptist Convention U.S.A., Inc.*, 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982).

In order for charitable hospital operated by a religious order of Catholic sisters to be deemed operated primarily for religious purposes, the religious purpose of the hospital must be of first importance. *St. Vincent Infirmary Medical Ctr. v. Director of Labor*, 32 Ark. App. 71, 797 S.W.2d 460 (1990).

Board of Review erred in finding that charitable hospital, operated by religious order of Catholic sisters, was not operated primarily for religious purposes, and in denying the exemption on that ground. *St. Vincent Infirmary Medical Ctr. v. Director of Labor*, 32 Ark. App. 71, 797 S.W.2d 460 (1990).

Where the religion pervades the operation of the institution, exemption of the operation as one operated primarily for a religious purpose may be had. *Terwilliger v. St. Vincent Infirmary Medical Ctr.*, 304 Ark. 626, 804 S.W.2d 696 (1991).

Where infirmary and medical center operated by Catholic order was operated primarily for the purpose of providing health care, although the sole motivation was religious in nature, exemption did not apply. *Terwilliger v. St. Vincent Infirmary Medical Ctr.*, 304 Ark. 626, 804 S.W.2d 696 (1991).

Solicitors.

Persons soliciting automobile club memberships on a commission basis are insurance agents or solicitors. *Arkansas Motor Club, Inc. v. Arkansas Emp. Sec. Div.*, 237 Ark. 419, 373 S.W.2d 404 (1963).

Truck Drivers.

Moneys paid by the appellant company to truck drivers constituted wages in return for services rendered and, therefore, the company's business constituted "employment," notwithstanding the contention that the company merely acted as a clearinghouse for the distribution of payments received from third parties, where the owner of the company testified that he did the mileage, tax reporting, filing and paying on his trucks and that checks for loads came in to the company and the company dispersed money to the drivers. *Steinert v. Director, Ark. Emp. Sec. Dep't*, 64 Ark. App. 122, 979 S.W.2d 908 (1998).

Violation.

Even though it is not the duty of the ESD to aid an unemployment claimant alleging a violation of this section, it is legislatively mandated that an investigation by the ESD, if undertaken, be performed to curtail violations by employers; the investigation must be adequate to achieve the purpose set forth in § 11-10-307. *Rodriguez v. Director, Ark. Emp. Sec. Dep't*, 59 Ark. App. 8, 952 S.W.2d 186 (1997).

11-10-211. Employment office.

As used in this chapter, unless the context clearly requires otherwise, "employment office" means a free public employment office or branch thereof operated by this or any other state as a part of a state-controlled system of public employment offices or by a federal agency charged with the administration of an unemployment compensation program or free public employment offices.

History. Acts 1941, No. 391, § 2; 1955, No. 395, § 1; A.S.A. 1947, § 81-1103.

11-10-212. Unemployment Compensation Fund.

As used in this chapter, unless the context clearly requires otherwise, “fund” means the Unemployment Compensation Fund established by this chapter.

History. Acts 1941, No. 391, § 2; A.S.A. 1947, § 81-1103.

11-10-213. State.

As used in this chapter, unless the context clearly requires otherwise, “state” includes the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

History. Acts 1941, No. 391, § 2; 1977, No. 376, § 5; 1983, No. 482, § 4; A.S.A. 1947, § 81-1103.

11-10-214. Unemployment.

(a) As used in this chapter, unless the context clearly requires otherwise, an individual shall be deemed “unemployed” with respect to any week during which:

- (1) He or she performs no services;
- (2) No wages are payable to him or her with respect to that week, or if wages are payable to him or her for any week of less than full-time work, the wages are less than one hundred forty percent (140%) of his or her weekly benefit amount; and
- (3) He or she is not on leave approved by an employer under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., as in effect January 1, 2003.

(b) An individual’s week of unemployment shall be deemed to commence the day on which he or she registers at a local employment office, except as the Director of the Department of Workforce Services may, by regulation, otherwise prescribe.

History. Acts 1941, No. 391, § 2; 1949, No. 155, § 2; 1971, No. 35, § 4; 1977, No. 366, § 3; A.S.A. 1947, § 81-1103; Acts 1987, No. 753, § 2; 1991, No. 48, § 1; 1991, No. 100, § 4; 2003, No. 1223, § 2.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS	Entitlement.
	Vacation.
Availability for Work.	Voluntarily Unemployed.

Availability for Work.

Employee not entitled to partial unemployment benefits since, under § 11-10-507(3), partial payments are not authorized where the worker is not available for work during the entire work week, and the availability requirement cannot be read out of subsection (a) to allow pro-rata benefits to the worker under a liberal interpretation of the statute. *Lanoy v. Daniels*, 271 Ark. 922, 611 S.W.2d 524 (1981).

Entitlement.

Claimant not eligible for benefits under § 11-10-507(3) since this section provides that a person is unemployed if he receives no wages for the period he seeks benefits. *McVey v. Daniels*, 270 Ark. 409, 605 S.W.2d 483 (1980).

Employees on a two-month paid administrative leave prior to a permanent layoff were not “unemployed” as defined by this section. *Rummel v. Director, Ark. Emp. Sec. Dep’t*, 59 Ark. App. 255, 957 S.W.2d 718 (1997).

Vacation.

Claimants were not entitled to unemployment payments during designated two-weeks vacation period. *ConAgra Frozen Foods, Inc. v. Director of Labor*, 34 Ark. App. 108, 806 S.W.2d 27 (1991).

An employee can possibly be unemployed during vacation, and the fact he is paid vacation pay is not in itself conclusive as to his ineligibility for unemployment benefits. If during a layoff period an employee’s prescribed vacation period arrives he would be entitled to receive that which he has already earned (vacation pay) without rendering him ineligible for unemployment compensation for the layoff period then in progress; however, claimants are not entitled to unemployment benefits during a period of paid vacation simply because the vacation period was preceded by a layoff period. *Sanyo Mfg. Corp. v. Director of Labor*, 37 Ark. App. 74, 822 S.W.2d 410 (1992).

Voluntarily Unemployed.

Under a union contract agreeing that management had the right to shut down the plant for a plant-wide vacation period, those employees lacking seniority for vacation pay met every qualification of the law required for entitlement to unemployment benefits, there being no indication that claimants voluntarily and without good cause left their work so as to be disqualified from the benefits. *Harmon v. Laney*, 239 Ark. 603, 393 S.W.2d 273 (1965).

11-10-215. Wages.

(a) As used in this chapter, unless the context clearly requires otherwise, “wages” means all remuneration paid for personal services, including, but not limited to, commissions, bonuses, cash value of all remuneration paid in any medium other than cash, the value of which shall be estimated and determined in accordance with regulations prescribed by the Director of the Department of Workforce Services, and tips received while performing services which constitute employment and which are included in a written statement furnished to the employer pursuant to 26 U.S.C. § 6053(a). Provided that, the term “wages” shall not include:

(1)(A) For the purposes of §§ 11-10-701 — 11-10-715:

(i) That part of remuneration paid to an individual by an employer with respect to employment during any calendar year beginning after December 31, 2003, and ending December 31, 2009, which exceeds ten thousand dollars (\$10,000); and

(ii) For any calendar year beginning after December 31, 2009, that part of remuneration which exceeds twelve thousand dollars (\$12,000).

(B) For the purposes of this subsection:

(i) Wages paid within a calendar year by a predecessor employer may be counted as though paid by a successor as defined in §§ 11-10-701 — 11-10-715; and

(ii) The term “employment” includes services constituting employment under any unemployment insurance law of another state;

(2) The amount of any payment, with respect to services made to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provision for its employees, or for its employees and their dependents, including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any payment, on account of:

(A) Retirement;

(B)(i) Sickness or accident disability, except payments made directly to the employee or his or her dependents.

(ii) However, payments made directly to an employee or his or her dependents under a workers’ compensation law shall not be considered to be “wages”;

(C) Medical and hospitalization expenses in connection with sickness or accident disability; or

(D) Death, provided the individual in its employ does not have the:

(i) Option to receive, instead of provision for the death benefit, any part of the payment, or, if the death benefit is insured, any part of the premiums or contributions to premiums paid by his or her employing unit; and

(ii) Right, under the provisions of the plan or system or policy of insurance providing for the death benefit, to assign the benefit or to receive cash consideration in lieu of the benefit either upon his or her withdrawal from the plan or system providing for the benefit or upon termination of the plan or system or policy of insurance or of his or her services with the employing unit;

(3) The payment by an employing unit, without deduction from the remuneration of the individual in its employ, of the tax imposed by the Federal Insurance Contributions Act upon an individual in its employ with respect to services performed;

(4) Payments made by an employer under a cafeteria plan, within the meaning of 26 U.S.C. § 125, if the payment would not be treated as wages without regard to the plan and it is reasonable to believe that, if 26 U.S.C. § 125 applied for purposes of this section, 26 U.S.C. § 125 would not treat any wages as constructively received; or

(5) Fees paid to corporate directors.

(b) Except as otherwise provided in regulations prescribed by the director, any third party which makes a sickness or accident disability payment which is defined in this section as wages shall be treated for purposes of this section and §§ 11-10-701 — 11-10-715 as the employer with respect to the wages.

(c) Nothing in this section, except subdivision (a)(1), shall exclude from the term “wages”:

(1) Any employer contribution under a qualified cash or deferred arrangement, as defined in section 401(k) of the Internal Revenue Code; or

(2) Any amount treated as an employer contribution under section 414(h)(2) of the Internal Revenue Code.

(d) Any amount deferred under a deferred compensation plan shall be treated as wages when the services for which compensation is deferred are performed.

History. Acts 1941, No. 391, § 2; 1943, No. 138, §§ 24, 25; 1947, No. 398, § 1; 1949, No. 155, § 2; 1955, No. 395, § 4; 1971, No. 35, § 5; 1975 (Extended Sess., 1976), No. 1083, § 4; 1977, No. 366, § 4; 1981, No. 43, § 1; 1983, No. 482, § 5; 1985, No. 8, § 2; 1985, No. 9, § 2; A.S.A. 1947, § 81-1103; reen. Acts 1987, No. 672, § 3; Acts 1987, No. 753, §§ 3, 4; 1989, No. 420, §§ 1, 2; 1993, No. 6, § 2; 1995, No. 519, § 1; 2003, No. 353, § 1; 2009, No. 802, § 2.

A.C.R.C. Notes. Part of this section was reenacted by Acts 1987, No. 672, § 3. Acts 1987, No. 834 provided that 1987

legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

U.S. Code. The Federal Insurance Contributions Act referred to in this section is codified as 26 U.S.C. § 3101 et seq.

Section 414(h)(2) of the Internal Revenue Code, referred to in this section, is codified as 26 U.S.C. § 414(h)(2).

Section 401(k) of the Internal Revenue Code, referred to in this section, is codified as 26 U.S.C. § 401(k).

RESEARCH REFERENCES

ALR. Tips as Wages for Purposes of State Wage Laws. 61 A.L.R.6th 61.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General As-

sembly, Labor Law, Calculations for Unemployment Benefits, 26 U. Ark. Little Rock L. Rev. 423.

CASE NOTES

ANALYSIS

Computation of Payments.
Definition.

Computation of Payments.

The computation of unemployment benefits must be based upon wages actually paid during the base year rather than upon wages merely payable. *Employment Sec. Div. v. Hubbard*, 266 Ark. 725, 587 S.W.2d 835 (1979).

Definition.

The definition of wages is only relevant when used in the context of this chapter;

employer in action for recovery of sales commissions was not entitled to instruction on the definition. *Curtis Communications v. Collar*, 11 Ark. App. 14, 665 S.W.2d 301 (1984).

Home care company was properly found to be liable for unemployment insurance taxes where its caregivers' wages constituted remunerations under subsection (a) of this section; it was clear that the caregivers performed personal services for wages. *Home Care Prof'l of Ark., Inc. v. Williams*, 95 Ark. App. 194, 235 S.W.3d 536 (2006).

11-10-216. Week.

As used in this chapter, unless the context clearly requires otherwise, "week" means a seven-consecutive-calendar-day period beginning on Sunday at 12:01 a.m. and ending on Saturday at midnight.

History. Acts 1941, No. 391, § 2; A.S.A. 1947, § 81-1103; Acts 1987, No. 753, § 5.

11-10-217. Insured work.

As used in this chapter, unless the context clearly requires otherwise, “insured work” means employment for employers.

History. Acts 1941, No. 391, § 2; A.S.A. 1947, § 81-1103.

11-10-218. Rate year.

As used in this chapter, unless the context clearly requires otherwise, “rate year” means a twelve-month period beginning on January 1 and ending on December 31.

History. Acts 1941, No. 391, § 2; 1963, No. 93, § 3; A.S.A. 1947, § 81-1103.

11-10-219. Computation date.

As used in this chapter, unless the context clearly requires otherwise, “computation date” means June 30 of the preceding calendar year.

History. Acts 1941, No. 391, § 2; 1963, No. 93, § 3; A.S.A. 1947, § 81-1103.

11-10-220. Educational institutions.

(a)(1) As used in this chapter, unless the context clearly requires otherwise, an “institution of higher education” means an educational institution that:

(A) Admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such a certificate;

(B) Is legally authorized in this state to provide a program of education beyond high school;

(C) Provides an educational program for which it awards a bachelor’s or higher degree, provides a program which is acceptable for full credit toward such a degree, or offers a program of training to prepare students for gainful employment in a recognized occupation; and

(D) Is a public or other nonprofit institution.

(2) Notwithstanding any of the provisions of subdivision (a)(1) of this section, all colleges and universities in this state are institutions of higher education for purposes of this section.

(b) For the purposes of this chapter, an educational institution, other than an institution of higher education, is one:

(1) In which participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowl-

edge, skills, information, doctrines, attitudes, or abilities from, by, or under the guidance of an instructor or teacher;

(2) Which is approved, licensed, or issued a permit to operate as a school by the Department of Education or other government agency that is authorized within the state to approve, license, or issue a permit for the operation of a school;

(3) Which offers a course of study or training which may be academic, technical, trade, or in preparation for gainful employment in a recognized occupation; and

(4) Which does not meet the definition of an "institution of higher education" as set forth in subsection (a) of this section.

History. Acts 1941, No. 391, § 2; 1971, No. 35, § 6; 1977, No. 376, § 6; A.S.A. 1947, § 81-1103.

11-10-221. Hospital.

As used in this chapter, unless the context clearly requires otherwise, "hospital" means an institution that has been licensed, certified, or approved by the Division of Health Facilities Services of the Department of Health, as a hospital.

History. Acts 1941, No. 391, § 2; 1971, No. 35, § 6; A.S.A. 1947, § 81-1103.

11-10-222. United States.

As used in this chapter, unless the context clearly requires otherwise, the term "United States", when used in a geographical sense, includes the states, the District of Columbia, and the Commonwealth of Puerto Rico.

History. Acts 1941, No. 391, § 2; 1963, No. 93, § 2; 1971, No. 35, § 6; A.S.A. 1947, § 81-1103.

11-10-223. Supplemental benefit payments.

As used in this chapter, unless the context clearly requires otherwise, the term "supplemental benefit payments" means unemployment benefit payments made under a private unemployment compensation plan.

History. Acts 1941, No. 391, § 2; 1975 (Extended Sess., 1976), No. 1083, § 1; A.S.A. 1947, § 81-1103; reen. Acts 1987, No. 672, § 1.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 672, § 1. Acts

1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

11-10-224. References to gender.

Throughout this chapter, the pronoun “he” is deemed to include the masculine gender, the feminine gender, and, in the case of employers who are not persons, the neuter gender.

History. Acts 1941, No. 391, § 2; 1983, No. 482, § 6; A.S.A. 1947, § 81-1103.

11-10-225. American vessel.

“American vessel” means any vessel documented or numbered under the laws of the United States; and includes any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one (1) or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state.

History. Acts 1941, No. 391, § 2; 1971, No. 35, § 6; A.S.A. 1947, § 81-1103.

11-10-226. American aircraft.

“American aircraft” means an aircraft registered under the laws of the United States.

History. Acts 1941, No. 391, § 2; 1971, No. 35, § 6; A.S.A. 1947, § 81-1103.

11-10-227. Treatment of Indian tribes.

(a) The term “employer” shall include any Indian tribe for which service in employment as defined under this chapter is performed.

(b) The term “employment” shall include service performed in the employ of an Indian tribe, as defined in Section 3306(u) of the Federal Unemployment Tax Act, provided the service is excluded from “employment” as defined in the Federal Unemployment Tax Act solely by reason of Section 3306(c)(7) and is not otherwise excluded from “employment” under this chapter. For purposes of this section, the exclusions from employment in § 11-10-210(a)(4) shall be applicable to services performed in the employ of an Indian tribe.

(c) The term “tribal unit” means subdivisions, subsidiaries, and business enterprises wholly owned by an Indian tribe.

(d) Benefits based on service in employment defined in this section shall be payable in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other service subject under this chapter.

(e)(1) Indian tribes or tribal units subject to this chapter shall pay contributions under the same terms and conditions as all other subject employers unless they elect to pay into the state unemployment fund

amounts equal to the amount of benefits attributable to service in the employ of the Indian tribe.

(2) Indian tribes electing to make payments in lieu of contributions must make the election in the same manner and under the same conditions as provided in § 11-10-713 pertaining to state and local governments and nonprofit organizations subject to this chapter. Indian tribes will determine if reimbursement for benefits paid shall be elected by the tribe as a whole, by individual tribal units, or by combinations of individual tribal units.

(3) Indian tribes or tribal units shall be billed for the full amount of benefits attributable to service in the employ of the Indian tribe or tribal unit on the same schedule as other employing units that have elected to make payments in lieu of contributions.

(f)(1)(A) Failure of the Indian tribe or tribal unit to make required payments, including assessments of interest and penalty, within ninety (90) days after receipt of the bill shall cause the Indian tribe to lose the option to make payments in lieu of contributions, as described in subsection (e) of this section, for the following tax year unless payment in full is received before contribution rates for the next tax year are computed.

(B) Any Indian tribe that loses the option to make payments in lieu of contributions due to late payment or nonpayment, as described in subdivision (f)(1)(A) of this section, shall have the option reinstated if, after a period of one (1) year, all contributions have been made timely, provided that no contributions, payments in lieu of contributions for benefits paid, penalties, or interest remain outstanding.

(2)(A) Failure of the Indian tribe or any tribal unit thereof to make required payments, including assessments of interest and penalty, after all collection activities deemed necessary by the Director of the Department of Workforce Services have been exhausted shall cause services performed for the tribe to not be treated as “employment” for purposes of subsection (b) of this section.

(B) The director may determine that any Indian tribe that loses coverage under subdivision (f)(2) of this section may have services performed for the tribe again included as “employment” for purposes of subsection (b) of this section if all contributions, payments in lieu of contributions, penalties, and interest have been paid.

(C) If an Indian tribe fails to make payments required under subdivisions (f)(2)(A) and (B) of this section, including assessments of interest and penalty, within ninety (90) days after a final notice of delinquency, the director will immediately notify the United States Internal Revenue Service and the United States Department of Labor.

(g) Notices of payment and reporting delinquency to Indian tribes or their tribal units shall include information that failure to make full payment within the prescribed time frame:

(1) Shall cause the Indian tribe to be liable for taxes under the Federal Unemployment Tax Act;

- (2) Shall cause the Indian tribe to lose the option to make payments in lieu of contributions; and
- (3) Could cause the Indian tribe to be excepted from the definition of “employer”, as provided in subsection (a) of this section, and services in the employ of the Indian tribe, as provided in subsection (b) of this section, to be excepted from “employment”.
- (h) Extended benefits paid that are attributable to service in the employ of an Indian tribe and not reimbursed by the federal government shall be financed in their entirety by the Indian tribe.

History. Acts 2001, No. 1467, § 1.

U.S. Code. Sections 3306 (c)(7) and 3306(u) of the Federal Unemployment Tax

Act, referred to in this section, are codified as 26 U.S.C. §§ 3306(c)(7) and (3306)(u), respectively.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General As-

sembly, Labor Law, 24 U. Ark. Little Rock L. Rev. 493.

SUBCHAPTER 3 — ADMINISTRATION AND ENFORCEMENT

SECTION.	SECTION.
11-10-301. Department of Workforce Services — Creation — Director.	11-10-312. Federal-state cooperation.
11-10-302. [Repealed.]	11-10-313. Compensation based on multiple-state earnings.
11-10-303. Department of Workforce Services — Employee insurance plans.	11-10-314. Disclosure of information.
11-10-304. Arkansas State Employment Service — Creation.	11-10-315. Authority to administer oaths, issue subpoenas, etc.
11-10-305. State Employment Security Advisory Council — Creation.	11-10-316. Refusal to obey subpoena.
11-10-306. Director — Duties and powers generally.	11-10-317. Protection against self-incrimination.
11-10-307. Director — Rules and regulations.	11-10-318. Employing unit to keep and report work records.
11-10-308. Director — Administrative determinations of coverage.	11-10-319. Representation in court.
11-10-309. Director — Publication of rules, reports, etc.	11-10-320. Employment Security Administration Fund — Creation.
11-10-310. Director — Personnel.	11-10-321. Employment Security Administration Fund — Deposit and disbursement.
11-10-311. Employment stabilization.	11-10-322. Employment Security Administration Fund — Reimbursement of the fund.
	11-10-323, 11-10-324. [Repealed.]

Effective Dates. Acts 1945, No. 202, § 2: Mar. 8, 1945. Emergency clause provided: “It is hereby found and declared that the proper administration of the Employment Security Division of the Department of Labor is a necessary function of the State Government, and that only the provisions of this act will make for better

administration of said division. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall take effect and be in force from and after its passage and approval.” Acts 1953, No. 162, § 22: July 1, 1953. Acts 1953, No. 925, § 3: July 1, 1953.

Acts 1955, No. 325, § 30: July 1, 1955.

Acts 1963, No. 93, § 13: July 1, 1963.

Acts 1971, No. 35, § 25: approved Feb. 3, 1971. Emergency clause provided: "It is determined by the General Assembly of the State of Arkansas that an unemployment crisis exists in this State and in order to give better protection to the unemployed and their families extended benefits of the unemployment insurance program should be made available and to alleviate as much as possible the suffering and distress caused by unemployment, it is necessary to work in cooperation with the federal government; and in order to receive the benefits of federal law and comply with the mandate of the United States Congress as provided in United States Public Law 91-373, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety, this Act shall take effect and be in force from and after its passage."

Acts 1971, No. 220, § 4: Mar. 3, 1971. Emergency clause provided: "It is hereby found and determined by the General Assembly that the federal government provides group life insurance and group medical and hospital insurance for federal employees, that the federal government is, in a number of states, providing moneys to meet the employer obligation of providing group life insurance or group medical and hospital insurance for employees of the Employment Security Division of said States, and that the immediate passage of this Act is necessary in order to enable the employees of the Employment Security Division of the Department of Labor of the State of Arkansas to obtain the benefits of group life insurance and medical and hospital insurance. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 609, § 19: Mar. 28, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State are in need of immediate clarification and revision in order to provide adequate protection to the working and unemployed citizens of this State and that

this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1083, § 14: Jan. 30, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State of Arkansas are in need of immediate clarification and revision in order to provide adequate protection to the citizens of this State when they experience a period of unemployment and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1205, § 5: Feb. 11, 1976. Emergency clause provided: "It is hereby found and determined by the Seventieth General Assembly, meeting in Extended Session, that there exists an urgent need to provide office facilities for the U.S. Department of Labor — Employment Security Division at various locations throughout the State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of its passage and approval."

Acts 1977, No. 376, § 21: approved Mar. 8, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to receive the benefits of Federal law and to comply with the mandate of the United States Congress as provided in United States Public Law 94-566 and in order to give better protection to the unemployed workers and their families, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, this Act shall take effect and be in force from and after its passage."

Acts 1979, No. 252, § 5: July 1, 1979. Emergency clause provided: "It is hereby

found and determined by the General Assembly that the expeditious disposition of claims under the Workers' Compensation Law and of judicial review of adjudications made by agencies subject to the Administrative Procedure Act are of great interest and concern to the State of Arkansas and the parties involved in such proceedings; and that the present system of judicial review has not been adequate to insure the prompt and final determination of the issues involved in such matters and, as a result, there has been undue delay to the prejudice of the State and the parties involved. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after July 1, 1979."

Acts 1979, No. 537, § 15: July 1, 1979. Emergency clause provided: "It is hereby found and determined by the Seventy-Second General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1979 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1979 could work irreparable harm upon the proper administration and providing of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after July 1, 1979."

Acts 1981, No. 43, § 22: Feb. 10, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to restore and insure solvency to the State's unemployment insurance trust fund from which unemployment benefits are paid to unemployed Arkansas workers and in order to bring the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 96-364 and P.L. 96-499 and with P.L. 95-524, 96-249 and 96-265 so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas

workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1983, No. 482, § 41: Mar. 16, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to conform with P.L. 97-300 and to bring the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 97-248 and to insure the future solvency of the unemployment insurance fund so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1985, Nos. 8, 9, § 34: Jan. 30, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended by P.L. 98-21 and P.L. 98-369, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1985, No. 293, § 4: Mar. 8, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to aid in the detection of errors and abuses in Federal programs and in order to reduce the number of errors and abuses, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1985, No. 311, § 17: July 1, 1985. Emergency clause provided: "It is hereby found and determined by the Seventy-Fifth General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1985 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1985 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1985."

Acts 1985, No. 923, § 4: Apr. 15, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to aid in the detection of errors and abuses in Federal programs and in order to reduce the number of errors and abuses, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1987, No. 672, § 13: Apr. 7, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1083 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 753, § 30: July 1, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections to the Shared Work plan provisions which en-

able employers to avoid layoffs and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1987."

Acts 1987, No. 1003, § 5: Apr. 14, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1205 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1989, No. 420, § 17: Mar. 8, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections, and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force after its passage and approval."

Acts 1989 (1st Ex. Sess.), No. 238, § 19: July 1, 1989. Emergency clause provided: "It is hereby found and determined by the Seventy-Seventh General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for

more than a two (2) year period; that the effectiveness of this Act on July 1, 1989 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1989 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1989."

Acts 1991, No. 100, § 58: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of this act should become effective at the beginning of the next fiscal year; that the next fiscal year begins on July 1, 1991 and this act may not go into effect until after July 1, 1991 unless an emergency is declared. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

Acts 1991, No. 869, § 5: Mar. 29, 1991. Emergency clause provided: "It is hereby found and determined by the Seventy-Eighth General Assembly that it is in the best interest of the people of the State of Arkansas that paternity of the children be established in the most expedient manner for all children of this state; and the smooth transition from current requirements of those of this act require the provisions to become effective immediately upon passage. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1993, No. 6, § 21: Feb. 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that

Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 519, § 14: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

Acts 1997, No. 234, § 32: Feb. 21, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the

veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 250, § 258: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 1211 of 1995 established the procedure for all state boards and commissions to follow regarding reimbursement of expenses and stipends for board members; that this act amends various sections of the Arkansas Code which are in conflict with the Act 1211 of 1995; and that until this cleanup act becomes effective conflicting laws will exist. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1116, § 19: Apr. 5, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2001, No. 1367, § 11: Apr. 5, 2001 and No. 1467, § 7, Apr. 10, 2001. Emergency clauses provided: "It is hereby found and determined by the Eighty-third General Assembly that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 1223, § 15: Apr. 10, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Department into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2005, No. 902, § 15: Mar. 16, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible to bring the Arkansas Employment Security

Department into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive tax credits under the Federal Unemployment Tax Act and Arkansas workers may receive unemployment benefits whenever they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2007, No. 490, § 18; Mar. 26, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the act should go into effect as soon as possible in order to make needed technical changes; to enable the state to capture and utilize penalty and interest owing from claimants; and in order that the state might continue to be in compliance with the Federal Unemployment Tax Act, as amended. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its ap-

proval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2011, No. 115, § 2; Feb. 23, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that an immediate need exists to replace a dilapidated facility at Hope, Arkansas; that § 11-10-324 could be construed to mean that only federal funds could be used in entering into lease purchase agreements to meet the office needs of the Department of Workforce Services; and that this act is immediately necessary because a funding stream is presently available to finance the construction of new facilities and repeal of § 11-10-324 will clarify the authority of the department to receive and use that funding. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Burden of proof as to voluntariness of separation, 73 A.L.R.4th 1093.

Propriety of telephone testimony or hearings in unemployment compensation proceedings, 90 A.L.R.4th 532.

Ark. L. Rev. Administrative Law in Arkansas, 4 Ark. L. Rev. 107.

C.J.S. 81 C.J.S., Soc. Sec., etc., § 265 et seq.

CASE NOTES

Cited: *Jones v. Singer Career Sys.*, 584 F. Supp. 1253 (E.D. Ark. 1984).

11-10-301. Department of Workforce Services — Creation — Director.

(a)(1) There is created a department to be known as the Department of Workforce Services that shall be administered by a full-time salaried

director who shall be appointed by and serve at the pleasure of the Governor.

(2) The Director of the Department of Workforce Services shall have resided in the state for at least five (5) years and shall be a qualified elector.

(b) Before entering upon his or her duties, the director shall take and subscribe, and file in the office of the Secretary of State, an oath to support the United States Constitution and the Arkansas Constitution and to faithfully perform the duties of the office upon which he or she is about to enter.

(c) The director shall have such power and authority as he or she deems reasonable and proper for the effective administration of this chapter and will faithfully perform his or her duties and properly account for all funds received and disbursed by him or her under authority of this chapter.

(d) The director shall be the agent for service of process for all legal actions arising under this chapter or to which the department shall be named a party.

(e) The director shall procure an official seal, and every paper executed by the director in pursuance of law and sealed with the seal of his or her office shall be received in evidence in any court or other tribunal in this state and may be recorded in the same manner and with like effect as instruments regularly acknowledged.

(f)(1) The director shall have the authority to institute and prosecute in his or her name, as such, all suits, certificates of assessment, and other proceedings necessary for the collection of any taxes or overpayments collectible by him or her and which have become delinquent.

(2) No deposits of advance costs shall be required of the director in any suit or proceedings, nor shall he or she be required to give bond for costs, indemnity, or stay as a condition to the institution of any suit or proceedings, or to the issuance, service, or execution of any process therein, or ancillary thereto, or the appeal from any adverse action.

(g)(1) The director shall not be required to advance or pay any court costs to any court clerk for the institution or prosecution of any suit filed in his or her official capacity.

(2) No bond shall be required of the director in obtaining restraining orders, injunctions, or in any other cases where a bond is required to be made by a litigant, including supersedeas bond upon appeal.

History. Acts 1941, No. 391, § 10; 1945, No. 202, § 1; 1947, No. 398, § 10; 1955, No. 395, § 27; 1975 (Extended Sess., 1976), No. 1083, § 10; A.S.A. 1947, §§ 81-1113, 81-1114; reen. Acts 1987, No. 672, § 9; Acts 1991, No. 100, § 5; 1993, No. 6, § 3; 2005, No. 1705, § 1.

A.C.R.C. Notes. Part of this section was reenacted by Acts 1987, No. 672, § 9. Acts 1987, No. 834 provided that 1987

legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher's Notes. Acts 2005, No. 1705 renamed the Arkansas Employment Security Department created in this section to be the Department of Workforce Services.

CASE NOTES

Rules.

The administrator's rule requiring twenty-four hours' notice by employee or employer to obtain records of the division

for presentation of claims, was not unreasonable. *Bland v. Windsor Audit Co.*, 227 Ark. 719, 301 S.W.2d 34 (1957).

11-10-302. [Repealed.]

Publisher's Notes. This section, concerning Arkansas Employment Security Department, service to food stamp applicants, was repealed by Acts 2007, No. 490, § 2. The section was derived from Acts

1979, No. 537, §§ 9, 10; 1985, No. 311, §§ 12, 13; A.S.A. 1947, §§ 81-1114.1, 81-1114.2; Acts 1989 (1st Ex. Sess.), No. 238, § 14; 1991, No. 100, § 6.

11-10-303. Department of Workforce Services — Employee insurance plans.

(a) The Director of the Department of Workforce Services is authorized to formulate, adopt, and administer plans to provide the regular employees of the Department of Workforce Services, as an incident of their employment, with group life insurance or insurance against the payment of medical and hospital expenses or any similar type of insurance.

(b) Any plan adopted shall be paid pursuant to the contract entered into with one (1) or more insurance companies authorized to do business in this state, and it may require the payment of all or any part of the premium by the Department of Workforce Services or by the employees.

(c) If any plan adopted requires contributions by the employees, the director may provide for the withholding of the amount of the employees' contribution from their salaries. However, the contributing share of funds paid by the Department of Workforce Services as the employer shall come from funds granted to the agency by the United States Department of Labor for such purposes.

(d) The plan may provide for the continuation of any insurance provided on the same or on a different basis upon termination of employment or after the retirement of any employee who retires after March 3, 1971, pursuant to the Arkansas Public Employees' Retirement System.

(e) Any plan adopted shall provide benefits similar to those made available by the federal government to its employees generally, and the cost thereof per employee shall not exceed the cost per employee that the federal government pays for similar insurance benefits.

(f) Participation by any employee of the Department of Workforce Services in any plan adopted shall be on a voluntary basis at the option of the employee.

History. Acts 1971, No. 220, § 1; A.S.A. 1947, § 81-1126; Acts 1991, No. 100, §§ 7-9.

11-10-304. Arkansas State Employment Service — Creation.

(a) The Arkansas State Employment Service is established in the Department of Workforce Services.

(b) The Director of the Department of Workforce Services, in the conduct of the service, shall establish and maintain free public employment offices in such numbers and in such places as may be necessary for the proper administration of this chapter and for the purpose of performing such functions as are within the purview of the Act of Congress of June 6, 1933, hereinafter referred to as the “Wagner-Peyser Act”.

(c) The provisions of that act of Congress are accepted by this state, and the department is designated and constituted the agency of this state for the purposes of that act.

(d) All moneys received by this state under that act of Congress shall be paid into the Employment Security Administration Fund, § 11-10-320, and shall be expended solely for the maintenance of the state system of public employment offices.

(e)(1) For the purpose of establishing and maintaining free public employment offices and promoting the use of their facilities, the director is authorized to enter into agreements with the Railroad Retirement Board, or any other agency of the United States or of this or any other state, charged with the administration of any law whose purposes are reasonably related to the purposes of this chapter.

(2) As a part of such agreements, the director may accept moneys, services, or quarters as a contribution to the maintenance of the state system of public employment offices or as reimbursement for services performed.

(3) All moneys received for these purposes shall be paid into the Employment Security Administration Fund.

(f) In addition to the services and activities otherwise authorized by this chapter, the department may perform, or contract for the performance of, such other services and activities as shall be specified in contracts for payment or reimbursement of the costs thereof made with the United States Secretary of Labor, with any federal, state, or local public agency, or administrative entity, or with any employer or private for-profit or nonprofit organization under, in accordance with, and in furtherance of the purposes of the Job Training Partnership Act, Pub. L. No. 97-300 [repealed].

History. Acts 1941, No. 391, § 12; 1947, No. 398, § 11; 1949, No. 369, § 8; 1985, No. 8, § 22; 1985, No. 9, § 22; A.S.A. 1947, § 81-1115; Acts 1991, No. 100, §§ 10-12.

U.S. Code. The Wagner-Peyser Act referred to in this section is codified as 29 U.S.C. § 49 et seq. The Job Training Partnership Act is codified as 29 U.S.C. § 1501 et seq. [repealed].

11-10-305. State Employment Security Advisory Council — Creation.

(a) The Governor shall appoint a State Employment Security Advisory Council, composed of men and women, including an equal number of employer representatives and employee representatives, who may be fairly regarded as representative because of their vocation, employment, or affiliations, and of such members representing the general public as the Governor may designate.

(b) The advisory council shall aid the Director of the Department of Workforce Services in reviewing the unemployment insurance and the employment service programs as to their content, adequacy, and effectiveness and in making recommendations for their improvement.

(c) The advisory council shall meet at least once each calendar quarter and, in addition, as frequently as the director deems necessary.

(d)(1) The advisory council shall make reports of its meetings which shall include a record of its discussions and its recommendations.

(2) The director shall make the reports available to any interested persons or groups.

(e) The members of the advisory council may receive expense reimbursement and stipends in accordance with § 25-16-901 et seq.

History. Acts 1941, No. 391, § 11; 1949, No. 155, § 12; 1971, No. 35, § 17; 1975, No. 609, § 9; A.S.A. 1947, § 81-1114; Acts 1991, No. 100, § 13; 1997, No. 234, § 5; 1997, No. 250, § 60.

A.C.R.C. Notes. Pursuant to § 1-2-207, this section is set out above as amended by Acts 1997, No. 250. Subsection (e) of this section was also amended by Acts 1997, No. 234 to read as follows:

“(e) The members of the advisory council shall be paid in accordance with Section 25-16-903 when attending meetings in connection with their duties as members and shall be reimbursed for any travel or other expense incurred in accordance with the travel regulations applicable to the employees of the Arkansas Employment Security Department.”

11-10-306. Director — Duties and powers generally.

(a) It shall be the duty of the Director of the Department of Workforce Services to administer this chapter.

(b)(1) The Director shall have power and authority to adopt, amend, or rescind such rules and regulations, employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as he or she deems necessary or suitable to that end.

(2) Beginning on and after January 1, 1995, he or she shall have power and authority to equitably resolve issues involving employers or claimants if the issues are found to be the result of, or due to, agency error.

(c) Rules and regulations shall be effective upon publication in the manner, not inconsistent with the provisions of this chapter, which the director shall prescribe.

(d) The director shall determine his or her own organization and methods of procedure in accordance with the provisions of this chapter and shall have an official seal which shall be judicially noticed.

(e) Not later than June 30 of each year, the director shall submit to the Governor a report covering the administration and operation of this chapter during the preceding calendar year and shall make such recommendations for amendments to this chapter as he or she deems proper.

(f)(1) The reports shall include a balance sheet of the moneys in the funds in which there shall be provided, if possible, a reserve against the liability in future years to pay benefits in excess of the then-current contributions. This reserve shall be set up by the director in accordance with accepted actuarial principles on the basis of statistics of employment, business activity, and other relevant factors for the longest possible period.

(2) Whenever the director believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund, he or she shall promptly so inform the Governor and the General Assembly, and make recommendations with respect thereto.

(g)(1) The director, in addition to other provisions of this chapter, is authorized to set up and maintain in the Department of Workforce Services a unit known as the enforcement unit.

(2) The unit may be maintained by a staff adequate to make investigations, hold hearings, and take testimony in connection with the enforcement of this chapter to the end that fraudulent claims on the part of claimants and the violation of this chapter on the part of employers may be curtailed to the minimum possible.

(3) The employees of the unit shall have authority to make audits, investigate records and books of employers, hold hearings, administer oaths, and subpoena witnesses, papers, books, and records in connection with the investigations.

(4)(A) The subpoena shall be effective in any part of this state, and any circuit court either in term time or vacation may by order require additional witnesses or the production of other relevant evidence subpoenaed by the director or any other person duly authorized by the director.

(B) The court may compel obedience to its order by procedure of contempt.

History. Acts 1941, No. 391, § 11; § 16, provided, in part, that this section is not intended to repeal any of the provisions of the Employment Security Act but is intended to be in addition to those provisions.
1953, No. 162, § 16; A.S.A. 1947, § 81-1114; Acts 1991, No. 100, § 14; 1995, No. 519, § 2.

Publisher's Notes. Acts 1953, No. 162,

11-10-307. Director — Rules and regulations.

(a)(1) General and special rules may be adopted, amended, or rescinded by the Director of the Department of Workforce Services only after public hearing or opportunity to be heard thereon, on which proper notice has been given.

(2) General rules shall become effective ten (10) days after filing with the Secretary of State and publication in one (1) or more newspapers of general circulation in this state.

(3) Special rules shall become effective ten (10) days after notification to or mailing to the last known address of the individuals or employing units affected thereby.

(b) Regulations may be adopted, amended, or rescinded by the director and shall become effective in the manner and at the time prescribed by the director.

History. Acts 1941, No. 391, § 11;
A.S.A. 1947, § 81-1114.

CASE NOTES

Investigation of Violations.

Even though it is not the duty of the ESD to aid an unemployment claimant alleging a violation of § 11-10-207, it is legislatively mandated that an investigation by the ESD, if undertaken, be per-

formed to curtail violations by employers; the investigation must be adequate to achieve the purpose set forth in this section. *Rodriguez v. Director, Ark. Emp. Sec. Dep't*, 59 Ark. App. 8, 952 S.W.2d 186 (1997).

11-10-308. Director — Administrative determinations of coverage.

(a) The Director of the Department of Workforce Services may, upon his or her own motion or upon application of an employing unit, after notice and opportunity for hearing, make findings of fact and, on the basis thereof, determinations with respect to whether an employing unit constitutes an employer and whether services performed for or in connection with the business of an employing unit constitute employment for that employing unit.

(b)(1) However, the director may at his or her own instance and shall upon the application of any interested party, certify the question of coverage to the Board of Review for its determination.

(2) An appeal may be taken from a determination made by the director to the board on all matters with respect to coverage determined by the director within twenty (20) days after the mailing of notice of the findings and determination to the employing unit or, in the absence of mailing, within twenty (20) days after the delivery of the notice.

(c) If supported by substantial evidence and in the absence of fraud, a determination of the director, in the absence of appeal therefrom, and a determination of the board shall be conclusive except as to errors of law for all purposes of this chapter except as herein otherwise provided and, together with the record therein made, shall be admissible in any subsequent judicial proceeding involving liability for contributions.

(d) A review of the determination made by the director or the board may be had by filing a petition for review in the Court of Appeals within thirty (30) calendar days after the mailing of notice of the determination to the employing unit's last known address, or in the absence of mailing, within thirty (30) calendar days after the delivery of the notice.

(e)(1) A determination of the director which has not been appealed and a determination of the board, as provided for in this section, together with the record thereof, may be introduced in any proceeding involving a claim for benefits.

(2) The facts therein found and the determination therein made shall not be binding if evidence to the contrary is introduced in the hearing on the claim for benefits.

(f)(1) Any party appealing a determination of the director to the board or the court shall be required to file quarterly reports and pay all contributions, penalties, or interest due and owing during the appeal process.

(2) Upon finalization of the appeal, if it is found that no tax is owed or a lesser tax, penalty, or interest is owed, then that amount shall be refunded or credited to the employer's account.

History. Acts 1941, No. 391, § 11; A.S.A. 1947, § 81-1114; Acts 1997, No. 1943, No. 138, § 14; 1979, No. 252, § 3; 234, § 6; 2005, No. 902, § 1. 1985, No. 8, § 14; 1985, No. 9, § 14;

RESEARCH REFERENCES

Ark. L. Rev. Rules of Evidence in Administrative Proceedings, 15 Ark. L. Rev. 138.

CASE NOTES

ANALYSIS

Appeal.
Jurisdiction.
Participation in Proceedings.
Subpoena Power.
Venue.

Appeal.

Where petitioners pleaded as a ground for relief only that they were not employers within the purview of this chapter, they should have appealed to the board of review or circuit court pursuant to § 11-10-308 rather than to the chancery court under § 11-10-720. *Palmer v. Cline*, 254 Ark. 393, 494 S.W.2d 112 (1973).

Jurisdiction.

Where the alleged employer charged that the assessment by the Employment Security Division of the Department of Labor of unpaid unemployment contributions was an illegal exaction, the chancery court had jurisdiction pursuant to Ark. Const., Art. 16, § 13, and, in the absence of a motion to transfer the matter to law court, the chancellor should have deter-

mined the issue of whether the employer was afforded the notice and opportunity for hearing as required by this section. *Area Agency on Aging of W. Cent. Ark., Inc. v. Everett*, 279 Ark. 47, 648 S.W.2d 467 (1983).

Participation in Proceedings.

Alleged employer has the right to participate in proceedings. *Crossett Lumber Co. v. McCain*, 205 Ark. 631, 170 S.W.2d 64 (1943), superseded by statute as stated in, *Morris v. Everett*, 647 S.W.2d 476 (1983) (decision under prior law).

Subpoena Power.

Where claimant sought the presence of a witness for the purpose of testifying on the very point upon which he was found to have been disqualified from benefits, the referee had the authority to issue a subpoena for the witness. *Cross v. Daniels*, 271 Ark. 201, 607 S.W.2d 680 (1980).

Venue.

There is no present statutory authority for a circuit court to transfer a case to another county solely because it is filed in the wrong county. *Dunahay v. Arkansas*

Emp. Sec. Div., 265 Ark. 442, 578 S.W.2d 575 (1979).

Where a resident of one county was determined to be an employer as defined by this chapter, and a complaint for a review of this decision was filed in that county circuit court, the trial judge prop-

erly granted the motion to dismiss for lack of venue. *Dunahay v. Arkansas Emp. Sec. Div.*, 265 Ark. 442, 578 S.W.2d 575 (1979).

Cited: *West Land Servs. v. Dir., Ark. Dep't of Workforce Servs.*, 2012 Ark. App. 161, — S.W.3d — (2012).

11-10-309. Director — Publication of rules, reports, etc.

The Director of the Department of Workforce Services shall make available for distribution to the public the text of this chapter, his or her regulations and general and special rules, his or her annual report to the Governor, and any other material he or she deems relevant and suitable and shall furnish the materials to any person upon application therefor.

History. Acts 1941, No. 391, § 11; 1985, No. 8, § 15; 1985, No. 9, § 15; A.S.A. 1947, § 81-1114.

11-10-310. Director — Personnel.

(a) Subject to other provisions of this chapter, the Director of the Department of Workforce Services is authorized to appoint, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other persons as may be necessary in the performance of his or her duties under this chapter.

(b) The director may delegate to any such person such power and authority as he or she deems reasonable and proper for the effective administration of this chapter and may, in his or her discretion, bond any person handling moneys or signing checks hereunder.

(c) The director is authorized and directed to provide for a merit system covering all persons employed in the administration of this chapter and shall have authority, by regulation, to provide for all matters that are appropriate to the maintenance of this system on the basis of efficiency and fitness.

(d) The director is authorized to adopt such regulations as may be necessary to meet personnel standards promulgated by the Social Security Board pursuant to the Social Security Act, and the Wagner-Peyser Act, and to provide for the maintenance of the merit system required under this section in conjunction with any merit system applicable to any other state agency which meets the personnel standards promulgated by the board.

History. Acts 1941, No. 391, § 11; A.S.A. 1947, § 81-1114.

U.S. Code. The Social Security Act referred to in this section is codified pri-

marily in Title 42 of the U.S. Code. The Wagner-Peyser Act is codified as 29 U.S.C. § 49 et seq.

11-10-311. Employment stabilization.

The Director of the Department of Workforce Services, with the advice and aid of the State Employment Security Advisory Council, shall take all appropriate steps to reduce and prevent unemployment, to encourage and assist in the adoption of practical methods of vocational training, retraining, and vocational guidance, to investigate, recommend, advise, and assist in the establishment and operation by municipalities, counties, planning districts, school districts, and the state of programs for public works to be used in times and places of economic downturn and high unemployment for the purpose of promoting the employment of unemployed and underemployed workers throughout the state, and to these ends, to carry on research and such investigations as he or she shall deem necessary and to publish the results thereof.

History. Acts 1941, No. 391, § 11; 1975, No. 609, § 10; A.S.A. 1947, § 81-1114; Acts 1991, No. 100, § 15.

11-10-312. Federal-state cooperation.

(a) In the administration of this chapter, the Director of the Department of Workforce Services shall cooperate with the United States Department of Labor to the fullest extent consistent with the provisions of this chapter and shall take such action, through the adoption of such appropriate rules, regulations, administrative methods, and standards as may be necessary to secure to this state and its citizens all advantages available under the provisions of the Social Security Act that relate to unemployment compensation, the Federal Unemployment Tax Act, the Wagner-Peyser Act, the Job Training Partnership Act [repealed], and the Federal-State Extended Unemployment Compensation Act of 1970.

(b) In the administration of the provisions in §§ 11-10-534 — 11-10-543, which are enacted to conform with the requirements of the Federal-State Extended Unemployment Compensation Act of 1970, the director shall take such action as may be necessary to:

(1) Ensure that the provisions are so interpreted and applied as to meet the requirements of the federal act referred to in this subsection as interpreted by the United States Department of Labor; and

(2) Secure to this state the full reimbursement of the federal share of extended benefits paid under this chapter that are reimbursable under the federal act referred to in this subsection.

History. Acts 1941, No. 391, § 11; 1971, No. 35, § 17; 1985, No. 8, § 16; 1985, No. 9, § 16; A.S.A. 1947, § 81-1114.

U.S. Code. Provisions of the Social Security Acts that relate to unemployment compensation are primarily codified

in Title 26 of the U.S. Code. The Federal Unemployment Tax Act is codified as 26 U.S.C. § 3301 et seq. The Wagner-Peyser Act is codified as 29 U.S.C. § 49 et seq. The Job Training Partnership Act is primarily codified as 29 U.S.C. § 1501 et seq.

[repealed]. The Federal-State Extended Unemployment Compensation Act of 1970 is codified as 26 U.S.C. § 3304.

11-10-313. Compensation based on multiple-state earnings.

(a) The Director of the Department of Workforce Services shall participate in any arrangements for the payment of compensation on the basis of combining an individual's wages and employment covered under this chapter with his or her wages and employment covered under the unemployment compensation laws of other states which are approved by the United States Secretary of Labor in consultation with the state unemployment compensation agencies as reasonably calculated to assure the prompt and full payment of compensation in those situations and which include provisions for:

(1) Applying the base period of a single state law to a claim involving the combining of an individual's wages and employment covered under two (2) or more state unemployment compensation laws; and

(2) Avoiding the duplicate use of wages and employment by reason of such combining.

(b)(1) Any and all wage and employment information necessary for the carrying out of the arrangements shall be promptly provided by employers upon request by the director.

(2) Willful failure to promptly provide the information shall subject an employer to the penalties set forth in § 11-10-106(b).

History. Acts 1971, No. 35, § 20; 1985, No. 8, § 30; 1985, No. 9, § 30; A.S.A. 1947, § 81-1123; Acts 1991, No. 100, § 16.

11-10-314. Disclosure of information.

(a)(1) Except as otherwise provided in this section, information obtained by the Director of the Department of Workforce Services from any employing unit or individual pursuant to the administration of this chapter and any determination as to the rights or status of any employer or individual made by the director pursuant to the administration of this chapter shall be held confidential and shall be protected by government privilege.

(2)(A) The information shall not be used in any action or proceeding before any court, administrative tribunal, or body except those created by this chapter unless the Department of Workforce Services is a party, a real party in interest, or a complainant therein or unless the litigation involves criminal actions brought under provisions of this chapter.

(B) This information shall not be otherwise disclosed or be open to public inspection in any manner revealing the individual's or employing unit's identity.

(b)(1) Information from the records of the Department of Workforce Services that concerns a claim for benefits shall be available for

inspection and copying by any interested party or his or her legal representative to the extent necessary for the proper representation of his or her position in any proceeding under this chapter.

(2) Notwithstanding any other provision of this chapter or any other law:

(A) Any claimant may be supplied, subject to such restrictions as the director may by regulation prescribe, with any information contained in his or her unemployment insurance benefit payment record or on his or her most recent monetary determination;

(B) Any individual or employer may be provided any information from the records of the Department of Workforce Services to the extent that the information was provided by him or her; and

(C) Any job applicant may be provided with evidence of his or her registration for work.

(c)(1)(A) Subject to such restrictions as the director may by regulation prescribe, the confidential information may be made available to any agency of this or any other state, or any federal agency, charged with the administration of an unemployment compensation law or the maintenance of a system of public employment offices, the Internal Revenue Service, the Office of Federal Contract Compliance, the United States Bureau of Labor Statistics of the United States Department of Labor, or any state or federal agency for income or eligibility verification purposes but except as may otherwise be provided in this section and §§ 11-10-305 — 11-10-312 and 11-10-315 — 11-10-318 only as and to the extent mandated by Pub. L. No. 98-369 and implementing regulations promulgated thereunder by the United States Department of Labor.

(B) The information obtained in connection with the administration of the employment service may be made available to persons or agencies for purposes appropriate to the operation of a public employment service.

(2) Upon request, the director shall furnish to any agency of the United States charged with the administration of public works or assistance through public employment and may furnish to any state agency similarly charged, the name, address, ordinary occupation, and employment status of each recipient of benefits and the recipient's rights to further benefits under this chapter.

(d) The director may request the Comptroller of the Currency to cause an examination of the correctness of any return or report of any national banking association rendered pursuant to the provisions of this chapter and may in connection with this request transmit any report or return to the comptroller as provided in section 1606(c) [repealed] of the Internal Revenue Code of 1939.

(e)(1)(A) Upon request of a public agency administering or supervising the administration of a state plan of Aid to Families with Dependent Children approved under Part A of Title IV of the Social Security Act, or the administration of a state plan of medical assistance approved under Title XIX of the Social Security Act, the

administration of a state plan of food stamps approved under the Food Stamp Act of 1977, Pub. L. No. 95-113, request of a public agency charged with any duty or responsibility authorized or required under the Child Support and Establishment of Paternity Program provisions of Part D of Title IV of the Social Security Act, or request of officers or employees of the United States Department of Agriculture, the director shall furnish to the public agency information contained in the files of the Department of Workforce Services with respect to any individual specified in the request as to whether the individual is receiving, has received, or has made application for unemployment compensation, the date the individual was determined eligible or ineligible, the date the individual's claim was exhausted, the weekly benefit amount actually paid and the date paid, the individual's weekly benefit amount, whether the individual is receiving or has received wages, the name and address of the employer from whom the wages have been received and the amount of any wages received by the individual, the current or most recent home address of the individual, whether the individual has refused an offer of employment, and, if so, a description of the employment so offered, including, but not limited to, the terms, conditions, and rate of pay therefor.

(B) The requesting agency shall reimburse the Department of Workforce Services for costs incurred in providing the requested information.

(2) The director shall promulgate regulations establishing such safeguards as are necessary to ensure that information disclosed as authorized in this section to state and local child support enforcement agency officers and employees is used only for purposes of establishing and collecting child support obligations from and locating individuals owing the obligations and to ensure that information disclosed as authorized in this section to officers and employees of the United States Department of Agriculture and to officers and employees of any state food stamp agency is used only for purposes of determining an individual's eligibility for benefits or the amount of benefits under the food stamp program established under the Food Stamp Act of 1977.

(3) Information requested by the Department of Human Services and the Department of Finance and Administration under this subsection shall be released to the appropriate divisions of the respective departments on a basis in accordance with a plan to be developed between the appropriate division of each department and the Department of Workforce Services.

(4)(A) In addition to the above, wage information contained in the records of the Department of Workforce Services shall be made available to the extent necessary for purposes of determining an individual's eligibility for aid or services or the amount of the aid or services to which an individual may be entitled under a state plan for aid and services to needy families with children approved under Part A of Title IV of the Social Security Act to a state or political

subdivision thereof charged with the responsibility of making the determinations when the information is specifically requested on an individual by name and social security number by the state or political subdivision for those purposes.

(B) The governmental agency or entity requesting any information under this subsection shall reimburse the Department of Workforce Services for any and all costs incurred by the agency in making the requested information available.

(5)(A)(i) Officers or employees of the United States Department of Housing and Urban Development and representatives of a public housing agency shall be entitled to certain wage and unemployment compensation information with respect to individuals applying for or participating in any housing assistance program administered by the United States Department of Housing and Urban Development as provided for in Section 303 of the Social Security Act at 42 U.S.C. § 503 but only as and to the extent mandated by Section 904(c) of Pub. L. No. 100-628, the McKinney Homeless Act, and implementing regulations.

(ii) All requests received by the director under this subsection shall be processed within three (3) business days.

(B) The requesting agency shall reimburse the Department of Workforce Services for the costs incurred in providing the requested information.

(f)(1)(A)(i) All records, files, and documents of the Department of Workforce Services pertaining to claims, benefit payments, assessments, contributions, disqualifications for benefits, removals of disqualifications for benefits, charges and credits to accounts, and classification of employers, wherever located, which relate in any way to an employer or an employee of the employer shall be made available at all times for examination by an affected employer, a claimant, or the duly authorized representative of an employer or a claimant.

(ii) But no record, file, or document shall be removed from the custody of the Department of Workforce Services.

(B)(i) Any information made available under this provision to a claimant shall be information pertaining only to that claimant.

(ii) Any information made available under this provision to an affected employer shall be information pertaining only to that employer.

(2) No finding of fact or conclusion of law contained in a decision of the Department of Workforce Services, an appeals hearing officer, the Board of Review, or a court obtained under this chapter shall have a preclusive effect in any other action or proceeding except proceedings under this chapter.

(g)(1) To the extent necessary for the proper verification of transactions affecting his or her account as provided in §§ 11-10-701 — 11-10-715, upon receipt by the director of a request from an affected employer for information concerning benefits paid to a claimant who

has been a base period employee of the employer, the director shall, as promptly as possible, furnish information regarding the periods of time for which benefits were paid and the amount of benefits chargeable to the employer that have been paid to the claimant up to the date of the employer's request for each worker the employer properly identifies in his or her request by social security account number and name.

(2) However, information regarding benefits charged more than one (1) year prior to the last computation date may not be given.

(h) Notwithstanding any other provisions of this chapter, information obtained in the administration of this chapter and in the administration of and concerning the Job Training Partnership Act, 29 U.S.C. § 1501 et seq. [repealed], and its successor, the Workforce Investment Act, Pub. L. No. 105-220, programs by the Department of Workforce Services shall be made available to persons and agencies for purposes appropriate to the Department of Workforce Services' operation and administration of the Job Training Partnership Act [repealed] and its successor, the Workforce Investment Act, Pub. L. No. 105-220, programs. Pursuant to an agreement between the Department of Workforce Services and the appropriate agencies, the director shall establish safeguards as are necessary to protect the confidential information made available pursuant to this section.

(i)(1)(A) Upon receipt of a subpoena of a Workers' Compensation Commission administrative law judge by the director, information from an individual's claim record or from his or her application for work may be made available to the commission for use in making administrative determinations under the Workers' Compensation Law, § 11-9-101 et seq., in court proceedings under that law, or in other actions reasonably necessary for the proper administration of the law.

(B) Photocopies of Department of Workforce Services records containing the information shall be received in evidence in any court or administrative proceeding had under the law provided that the copies have been sealed with the official seal of the director.

(2) The director shall not be obligated to make the information available unless:

(A) The subpoena is delivered at least five (5) work days prior to the date the information is required; and

(B) Payment of fifty dollars (\$50.00) for the cost of producing the information is made or tendered at the time of service of the order or within three (3) working days of service of the order.

(j) For use in furthering the economic development of the State of Arkansas, the director may provide, to the extent that it is available, the following information obtained in the administration of this chapter to the state agencies specified:

(1) The Arkansas Economic Development Council may be provided:

(A) The employer's name, mailing address, and business location in Arkansas; the name of the owner, chief executive officer, or plant manager; the current number of employees; and the code for each

employer classified by the agency in Standard Industrial Classification Codes 20-87 or the equivalent classification codes under the North American Industry Classification System; and

(B) The claims status of workers hired by employers under the Arkansas Economic Development Council's Arkansas Enterprise Zone Program authorized by the Arkansas Enterprise Zone Act of 1993, § 15-4-1701 et seq., and the Arkansas Economic Development Act of 1995, § 15-4-1901 et seq., provided that the commission submits a list of workers by name and social security number;

(2) The Revenue Division of the Department of Finance and Administration may be provided:

(A) Such information as is required and necessary by the Arkansas Enterprise Zone Act of 1993, § 15-4-1701 et seq., and the Arkansas Economic Development Act of 1995, § 15-4-1901 et seq.;

(B) The net increase in employment at manufacturing and mining establishments as defined in § 26-51-505 that are participating in the manufacturing jobs tax credit program created by § 26-51-505 if the division provides a list of employers by name, location, and the period of time for which the data is sought; and

(C) Such information as is necessary for the effective operation of their respective programs to allow cooperation between the division and the Department of Workforce Services;

(3) The Arkansas Institute for Economic Advancement of the University of Arkansas at Little Rock may be provided covered wage and employment data by county on a quarterly basis by the two-digit Office of Management and Budget standard industrial classifications or the equivalent classification codes under the North American Industry Classification System;

(4) The Arkansas Rehabilitation Services may be provided employer quarterly wage reports and employer names, addresses, and phone numbers;

(5) The Arkansas State Highway and Transportation Department may be provided:

(A) The employer's name, the business location in Arkansas, the current number of employees, and the code for each employer classified by the agency in the Standard Industrial Classification Code or the equivalent classification code under the North American Industry Classification System; and

(B) Other information that is necessary for the effective operation of their respective programs in order to allow cooperation between the Arkansas State Highway and Transportation Department and the Department of Workforce Services; and

(6) The Arkansas Department of Environmental Quality may be provided the employer's name, mailing address, business location in Arkansas, the current number of employees, and the code for each employer classified by the agency in the Standard Industrial Classification Code or an equivalent classification code under the North American Industry Classification System.

(k)(1) The state entities specified in subsection (j) of this section are strictly prohibited from making any disclosure or redisclosure of the confidential information which may be made available to them under the provisions of subsection (j) of this section.

(2) Any publication of employer data by these entities shall be done in strict accordance with the rules used by the agency and as prescribed by the United States Bureau of Labor Statistics of the United States Department of Labor to prevent the disclosure of individual employer information.

(3) The governmental agency or entity requesting any information under subsection (j) of this section shall reimburse the Department of Workforce Services for any and all costs incurred by the agency in making the requested information available.

(4) Information requested by the state entities specified in subsection (j) of this section shall be released to the appropriate entities in accordance with agreements between these entities and the Department of Workforce Services.

(1)(1) Upon receipt of an order from a court of record of this state by the director for information pertaining to an individual's current wage file and unemployment benefit payment record as contained in the records of the Department of Workforce Services, the information shall be made available to the court for the purpose of determining an amount of support to be set during a proceeding for the establishment or collection of child support obligations, or both.

(2) A photocopy of the records containing the information or a statement that no information for the requested individual is contained in the file of the Department of Workforce Services under the official seal of the director shall be received into evidence in the court of record.

(3) The court order shall be satisfied by mailing the document under seal directly to the court of record within ten (10) working days of receipt of the court order unless a motion challenging the information is filed or a subpoena is issued requiring the appearance of an employee of the Department of Workforce Services with the court within thirty (30) days prior to the trial.

(4) The director shall comply with the court order for information if the following conditions are met:

(A) The order is delivered at least ten (10) workdays prior to the date that the information is required;

(B) The court order includes the name and social security number of the individual for whom information is requested; and

(C) The court order is accompanied by the payment of ten dollars (\$10.00) by the moving party seeking the information to the Department of Workforce Services for costs associated with producing the information.

(5) Provided, however, the Department of Workforce Services may not release information under this subsection if the United States Secretary of Labor rules that release of the information would be grounds to find that the state is in substantial noncompliance with 42 U.S.C. § 503 or 26 U.S.C. § 3304.

(m)(1) Beginning on and after January 1, 1995, the State Insurance Department may be provided with the name and address of any lessor employing unit as defined in § 11-10-717(e).

(2) The State Insurance Department shall be strictly prohibited from making any disclosure or redisclosure of any record containing confidential information provided by the Department of Workforce Services under this subsection.

(n)(1) Beginning on and after January 1, 1995, the Workers' Health and Safety Division of the Workers' Compensation Commission may be furnished, for production of the extra-hazardous employer identification formula, the following data to the extent that such data is maintained in the department's computer database:

- (A) Employer name;
- (B) Federal employer identification number;
- (C) Employer address and plant locations in Arkansas;
- (D) Employer telephone number;
- (E) Employer standard industrial classification code;
- (F) Maximum number of employees by calendar year;
- (G) Unemployment insurance account number; and
- (H) Reporting unit number.

(2)(A) The division shall be strictly prohibited from making any disclosure or redisclosure of the confidential information which may be made available to it under this subsection.

(B) Additionally, the division shall reimburse the Department of Workforce Services for any and all costs incurred by the Department of Workforce Services in making the information available.

(o)(1) Effective July 1, 1997, the director may provide information or take other actions necessitated by The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193.

(2) The director may furnish wage and claim information to the state and national New Hire Directories created by Pub. L. No. 104-193 for the purposes of locating individuals to establish paternity and to establish, modify, or enforce child support orders. The director may authorize state and local child support enforcement agencies to disclose unemployment compensation data to an agent and may permit state and local child support enforcement agencies to access such data for establishing paternity and other purposes.

(3) Information requested pursuant to Pub. L. No. 104-193 shall only be released in accordance with an agreement between the Department of Workforce Services and the appropriate state or federal agency. Safeguards protecting the confidentiality of such data and reimbursement of costs for providing such information will be made part of the agreement.

(p) The Disability Determination for Social Security Administration may be provided employee wage files and unemployment claim records for the purpose of investigations for potential fraud. The administration is strictly prohibited from making any disclosure or redisclosure of the confidential information which may be made available to it under this

subsection. Reasonable costs will be required for producing this information.

(q) The Workers' Compensation Fraud Investigation Unit of the State Insurance Department may be furnished pursuant to a subpoena any individual's wage file and unemployment benefit payment record as contained in the records of the Department of Workforce Services. These records are being provided for the sole purpose of investigating potential workers' compensation fraud. The unit is strictly prohibited from making any disclosure or redisclosure of the confidential information which may be made available to it under the provisions of this subsection. However, records provided to the unit pursuant to this subsection may be made part of a unit's referral for criminal charges to a local prosecutor under § 11-9-106(d)(3) and used in any resulting criminal trial or prosecution, including cases tried by employees of the unit under the provisions of § 11-9-106(e)(2). Reasonable costs may be required for producing the subpoenaed information.

(r)(1) The director, pursuant to a valid subpoena issued by a state prosecuting attorney, the Attorney General, a United States Attorney, a United States Magistrate Judge, or the Federal Bureau of Investigation, may release information in the possession of the Department of Workforce Services to law enforcement officials who seek unemployment information for the investigation or prosecution of a crime or to enforce an order of a court in a criminal matter.

(2) Nothing in this section shall be deemed to prohibit the Department of Workforce Services from providing information subpoenaed by the Attorney General in any case.

(3)(A) The director may release information in the possession of the Department of Workforce Services to federal public officials in the performance of their official duties acting through the United States Attorney's office.

(B) The information will be disclosed under an information exchange agreement with the United States Attorney's office, which will ensure the protection of the confidentiality of the information and the cost of providing the information.

(4) In cases except as provided in subdivision (r)(1) of this section, the director shall:

(A) First move to quash the subpoena; and

(B) Honor the subpoena and subpoenas dealing with similar subject matter, but only if a court of competent jurisdiction finds that the need to examine the subpoenaed information outweighs the express policy of maintaining confidentiality in matters involving individuals and employers dealing with the Department of Workforce Services.

(s)(1) To perform audit and compliance duties, the Department of Finance and Administration may be provided unemployment insurance contribution information reported by companies doing business in Arkansas, including without limitation employer name, employer address, employer telephone number, federal employer identification number, and tax identification number of employees.

(2) The Department of Finance and Administration shall not make any disclosure or redisclosure of the confidential information provided under subdivision (s)(1) of this section.

History. Acts 1941, No. 391, § 11; 1949, No. 155, § 13; 1977, No. 226, § 1; 1977, No. 376, § 15; 1981, No. 43, § 16; 1983, No. 482, § 32; 1985, No. 8, §§ 17-21; 1985, No. 9, §§ 17-21; 1985, No. 293, § 1; 1985, No. 923, § 1; A.S.A. 1947, § 81-1114; Acts 1987, No. 753, § 19; 1989, No. 420, §§ 3, 4; 1991, No. 100, §§ 17-21; 1991, No. 869, § 1; 1993, No. 6, § 4; 1995, No. 519, §§ 3, 4; 1997, No. 234, §§ 7-11; 1997, No. 540, § 14; 1999, No. 1116, §§ 6-8; 2001, No. 1367, §§ 1, 2; 2001, No. 1467, § 2; 2001, No. 1477, § 1; 2003, No. 1223, § 3; 2003, No. 1341, §§ 1, 2; 2005, No. 1845, § 2; 2009, No. 273, § 1; 2009, No. 504, § 1.

A.C.R.C. Notes. The reference to Office of Management and Budget in subdivision (j)(3) is an apparent reference to the Office of Management and Budget in the Executive Office of the President. See 31 U.S.C. § 501.

U.S. Code. Section 1606(c) of the Internal Revenue Code of 1939 referred to in this section has been repealed. For pres-

ent law, see 26 U.S.C. § 3305. Part A and Part D of Title IV of the Social Security Act are codified as 42 U.S.C. §§ 601 et seq. and 651 et seq., respectively. Public Law 98-369 is primarily codified throughout titles 26, 38, 41, and 42 of the U.S. Code. Title XIX of the Social Security Act is codified as 42 U.S.C. § 1396 et seq. The Food Stamp Act of 1964 and the Food Stamp Act of 1977 are both codified as 7 U.S.C. § 2011 et seq. The Job Training Partnership Act is primarily codified as 29 U.S.C. § 1501 et seq. [repealed]. The Stewart B. McKinney Homeless Assistance Act, referred to in this section, is codified primarily as 42 U.S.C. § 11301 et seq.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, referred to in this section, is codified as 8 U.S.C. §§ 1612, 1631, 1632, 1641, 1642, and as notes under 8 U.S.C. § 1183a and 42 U.S.C. §§ 601 and 1305.

RESEARCH REFERENCES

Ark. L. Rev. Watkins, Access to Public Records Under the Arkansas Freedom of Information Act, 37 Ark. L. Rev. 741.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General Assembly, Labor Law, 24 U. Ark. Little Rock L. Rev. 493.

Survey of Legislation, 2003 Arkansas General Assembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

Release of Employee Information.

The Employment Security Division was required to provide, pursuant to a subpoena duces tecum by the Workers' Compensation Commission, information that was furnished by a claimant to the Employment Security Division since the protection of this section was waived by the individual claimant upon his requesting the information which he provided; how-

ever, the identity of the employing unit and other collateral information obtained by the Employment Security Division in the ordinary course of its business would be privileged information and all references to the identity of the employing unit must be deleted. Arkansas Emp. Sec. Div. v. Beeler, 2 Ark. App. 251, 620 S.W.2d 307 (1981) (decision prior to 1981 amendment).

11-10-315. Authority to administer oaths, issue subpoenas, etc.

In the discharge of the duties imposed by this chapter, the Director of the Department of Workforce Services, the chair of an appeal tribunal, the members of the Board of Review, and any duly authorized representative of any of them shall have power to administer oaths and affirmations, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with disputed claims or the administration of this chapter.

History. Acts 1941, No. 391, § 11; 1943, No. 138, § 16; A.S.A. 1947, § 81-1114.

11-10-316. Refusal to obey subpoena.

(a) In case of contumacy by or refusal to obey a subpoena issued to any person, any court of this state within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which the person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Director of the Department of Workforce Services, the Board of Review, the chair of an appeal tribunal, or any duly authorized representative of any of them shall have jurisdiction to issue to the person an order requiring the person to appear before the director, the board, the chair of an appeal tribunal, or any duly authorized representative of any of them, there to produce evidence if so ordered or there to give testimony touching the matter under investigation or in question, and any failure to obey the order of the court may be punished by the court as a contempt thereof.

(b)(1) Any person who shall without just cause fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if it is in his or her power to do so, in obedience to a subpoena of the director, the board, the chair of an appeal tribunal, or any duly authorized representative of any of them shall be punished by a fine of not less than two hundred dollars (\$200) or by imprisonment for not longer than sixty (60) days, or by both fine and imprisonment.

(2) Each day that the violation continues shall be deemed to be a separate offense.

History. Acts 1941, No. 391, § 11; 1943, No. 138, § 17; A.S.A. 1947, § 81-1114.

11-10-317. Protection against self-incrimination.

(a) No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records before the Director of the Department of Workforce Services, the

Board of Review, the chair of an appeal tribunal, or any duly authorized representative of any of them or in obedience to the subpoena of any of them in any cause or proceeding before the director, the board, or an appeal tribunal on the ground that the testimony or evidence, documentary or otherwise, required of him or her may tend to incriminate him or her or subject him or her to a penalty or forfeiture.

(b) However, no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he or she is compelled, after having claimed his or her privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that the individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

History. Acts 1941, No. 391, § 11; 1943, No. 138, § 18; A.S.A. 1947, § 81-1114.

11-10-318. Employing unit to keep and report work records.

(a)(1) Each employing unit shall keep true and accurate work records, for such periods of time and containing such information as the Director of the Department of Workforce Services may prescribe.

(2) The records shall be open to inspection and be subject to being copied by the director or his or her authorized representatives at any reasonable time and as often as may be necessary.

(b) The director, the Board of Review, and the chair of any appeal tribunal may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which he or she or the board deems necessary for the effective administration of this chapter.

History. Acts 1941, No. 391, § 11; 1943, No. 138, § 15; A.S.A. 1947, § 81-1114.

11-10-319. Representation in court.

(a) **CIVIL ACTIONS.** In any civil action to enforce the provisions of this chapter, the Director of the Department of Workforce Services, the Board of Review, and the state may be represented by any qualified attorney who is employed by the director and is designated by him or her for this purpose or at the director's request by the Attorney General.

(b) **CRIMINAL ACTIONS.** All criminal actions for violations of any provisions of this chapter, or any rule or regulation issued pursuant thereto, shall be prosecuted by the Attorney General of the state, or by the prosecuting attorney of the county in which the violation occurred.

History. Acts 1941, No. 391, § 17; 1943, No. 138, § 22; 1963, No. 93, § 11; A.S.A. 1947, § 81-1120.

11-10-320. Employment Security Administration Fund — Creation.

(a) There is created in the State Treasury a special fund to be known as the Employment Security Administration Fund.

(b) All money deposited or paid into this fund shall be continuously available to the Director of the Department of Workforce Services for expenditure in accordance with the provisions of this chapter and shall not lapse at any time or be transferred to any other fund.

(c) The fund shall consist of any money appropriated by this state in accordance with this chapter; all money received from the United States or any agency thereof; all money received from any agency of the United States or any other state as compensation for services or facilities supplied to the agency; all amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the fund or by reason of damage to property, equipment, or supplies purchased from money in the fund; and all proceeds realized from the sale or disposition of any property, equipment, or supplies which may no longer be necessary for the proper administration of this law.

(d) Notwithstanding any provision of this section and §§ 11-10-321 and 11-10-322, all money requisitioned and deposited into this fund pursuant to this chapter shall remain part of the fund and shall be used only in accordance with the conditions specified in this chapter.

(e) The director shall transmit to the Auditor of State all documents and information required by the Auditor of State from which to prepare a register. The Auditor of State is authorized and directed to keep a register in his or her office of all checks and other fiscal transactions of the expenditures from the fund. This information shall be a public record.

History. Acts 1941, No. 391, § 13; 1985, No. 8, § 23; 1985, No. 9, § 23; 1953, No. 325, § 1; 1959, No. 142, § 2; A.S.A. 1947, § 81-1116.

11-10-321. Employment Security Administration Fund — Deposit and disbursement.

(a) All money in the Employment Security Administration Fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the State Treasury, except that money in this fund shall not be commingled with other state funds but shall be maintained in a separate account on the books of a depository bank.

(b) Disbursements shall be paid out of the fund on requisitions drawn by the Director of the Department of Workforce Services under regulations of the director.

(c) All money in this fund, except money received pursuant to the authorization in § 903 of the Social Security Act shall be expended solely for the purpose and in the amounts found necessary by the

United States Secretary of Labor for the proper and efficient administration of the employment security program.

History. Acts 1941, No. 391, § 13; 1953, No. 325, § 1; 1959, No. 142, § 2; A.S.A. 1947, § 81-1116; Acts 1991, No. 100, § 22.

U.S. Code. Section 903 of the Social Security Act referred to in this section is codified as 42 U.S.C. § 1103.

11-10-322. Employment Security Administration Fund — Reimbursement of the fund.

(a) If any money in the Employment Security Administration Fund, paid to this state under Title III of the Social Security Act or the Wagner-Peyser Act, is found by the United States Secretary of Labor, because of any action or contingency, to have been lost or to have been expended for purposes other than, or in amounts in excess of, those found necessary by the United States Secretary of Labor for the proper administration of the employment security program, it is the policy of this state that the money shall be replaced by money appropriated for that purpose by the state to the fund for expenditure as provided in this chapter.

(b) Upon receipt of such a finding by the United States Secretary of Labor, the Director of the Department of Workforce Services shall promptly report the amount required for the replacement to the Governor, and the Governor shall, at the earliest opportunity, submit to the General Assembly a request for the appropriation of that amount.

History. Acts 1941, No. 391, § 13; 1953, No. 325, § 1; 1959, No. 142, § 2; 1985, No. 8, § 24; 1985, No. 9, § 24; A.S.A. 1947, § 81-1116; Acts 1991, No. 100, § 23.

U.S. Code. Title III of the Social Security Act referred to in this section is codified as 42 U.S.C. § 501 et seq. The Wagner-Peyser Act is codified as 29 U.S.C. § 49 et seq.

11-10-323, 11-10-324. [Repealed.]

Publisher's Notes. These sections, concerning compliance with other laws, and agreements authorized, were repealed by Acts 2011, No. 115, § 1. They were derived from the following sources:

11-10-323. Acts 1975 (Extended Sess.,

1976), No. 1205, § 3; A.S.A. 1947, § 81-1010.3.

11-10-324. Acts 1975 (Extended Sess., 1976), No. 1205, §§ 1, 2; A.S.A. 1947, §§ 81-1010.1, 81-1010.2; reen. Acts 1987, No. 1003, §§ 1, 2; 2007, No. 186, § 2.

SUBCHAPTER 4 — EMPLOYER COVERAGE

SECTION.

11-10-401. Period.

11-10-402. Termination.

11-10-403. Election.

SECTION.

11-10-404. Nonprofit employers.

11-10-405. Contributions liability contingency.

Effective Dates. Acts 1971, No. 35, § 25: approved Feb. 3, 1971. Emergency

clause provided: "It is determined by the General Assembly of the State of Arkan-

sas that an unemployment crisis exists in this State and in order to give better protection to the unemployed and their families extended benefits of the unemployment insurance program should be made available and to alleviate as much as possible the suffering and distress caused by unemployment, it is necessary to work in cooperation with the federal government; and in order to receive the benefits of federal law and comply with the mandate of the United States Congress as provided in United States Public Law 91-373, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety, this Act shall take effect and be in force from and after its passage.”

Acts 1977, No. 376, § 21: approved Mar. 8, 1977. Emergency clause provided: “It is hereby found and determined by the General Assembly that in order to receive the benefits of Federal law and to comply with the mandate of the United States Con-

gress as provided in United States Public Law 94-566 and in order to give better protection to the unemployed workers and their families, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, this Act shall take effect and be in force from and after its passage.”

Acts 1991, No. 100, § 58: July 1, 1991. Emergency clause provided: “It is hereby found and determined by the General Assembly that the provisions of this act should become effective at the beginning of the next fiscal year; that the next fiscal year begins on July 1, 1991 and this act may not go into effect until after July 1, 1991 unless an emergency is declared. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991.”

RESEARCH REFERENCES

Am. Jur. 76 Am. Jur. 2d, Unemp. Comp., § 31.
C.J.S. 81 C.J.S., Soc. Sec., etc., § 172 et seq.

U. Ark. Little Rock L.J. Johnson, Survey of Arkansas Law: Labor Law, 2 U. Ark. Little Rock L.J. 259.

11-10-401. Period.

Except as provided in § 11-10-403, any employing unit that is or becomes an employer subject to this chapter within any calendar year shall be subject to this chapter during the whole of the calendar year.

History. Acts 1941, No. 391, § 8; A.S.A. 1947, § 81-1111.

11-10-402. Termination.

Except as otherwise provided in § 11-10-403, an employing unit may cease to be an employer subject to this chapter in accordance with the regulations of the Director of the Department of Workforce Services.

History. Acts 1941, No. 391, § 8; 1943, No. 256, § 2; A.S.A. 1947, § 81-1111.

11-10-403. Election.

(a)(1) An employing unit, not otherwise subject to this chapter, which filed with the Director of the Department of Workforce Services its written election to become an employer subject hereto for not less than two (2) calendar years shall, with the written approval of the election by the director, become an employer subject hereto to the same extent as all other employers, as of the date stated in the approval.

(2) That employing unit shall cease to be subject hereto as of January 1 of any calendar year subsequent to two (2) calendar years, only if during January of each year it has filed with the director a written notice to that effect.

(b)(1) An employing unit, for which services that do not constitute employment, as defined in this chapter, are performed, may file with the director a written election that all services performed by individuals in its employ in one (1) or more distinct establishments or places of business shall be deemed to constitute employment for all the purposes of this chapter for not less than two (2) calendar years.

(2) Upon the written approval of the election by the director, such services shall be deemed to constitute employment subject to this chapter from and after the date stated in the approval.

(3) The services shall cease to be deemed employment subject hereto as of January 1 of any calendar year subsequent to such two (2) calendar years, only if during January of such year the employing unit has filed with the director a written notice to that effect.

History. Acts 1941, No. 391, § 8; 1947, No. 398, § 8; A.S.A. 1947, § 81-1111; Acts 1991, No. 100, § 24.

11-10-404. Nonprofit employers.

(a)(1)(A) Any political subdivision of this state may elect to cover under this chapter service performed by employees in all of the hospitals and institutions of higher education, as defined in §§ 11-10-220 and 11-10-221, operated by the political subdivision.

(B) Election is to be made by filing with the Director of the Department of Workforce Services a notice of the election at least thirty (30) days prior to the effective date of the election.

(2) The election shall exclude any services described in § 11-10-210(a)(4).

(3) Any political subdivision electing coverage under this section shall make payments in lieu of contributions with respect to benefits attributable to the employment as provided with respect to nonprofit organizations in § 11-10-713(c) and (f).

(b) The provisions in § 11-10-509 with respect to benefit rights based on service for state and nonprofit institutions of higher education shall be applicable also to service covered by an election under this section.

(c) The amounts required to be paid in lieu of contributions by any political subdivision under this section shall be billed and payment

made as provided in § 11-10-713(d) with respect to similar payments of nonprofit organizations.

(d) An election under this section may be terminated by filing with the director written notice not later than thirty (30) days preceding the last day of the calendar year in which the termination is to be effective. The termination becomes effective as of the first day of the next ensuing calendar year with respect to services performed after that date.

History. Acts 1941, No. 391, § 8; 1971, No. 35, § 16; 1977, No. 376, § 14; A.S.A. 1947, § 81-1111.

11-10-405. Contributions liability contingency.

If at any time any of the employments excluded in §§ 11-10-201 — 11-10-226 shall become liable for federal unemployment tax, the employments shall thereupon immediately become liable for contributions under the provisions of this chapter.

History. Acts 1941, No. 391, § 2; 1949, No. 155, § 2; A.S.A. 1947, § 81-1103.

CASE NOTES

Cited: Thornbrough v. Gage, 234 Ark. 15, 350 S.W.2d 306 (1961); Garrett v. Cline, 257 Ark. 829, 520 S.W.2d 281 (1975); Hirschy v. Everett, 8 Ark. App. 174, 649 S.W.2d 412 (1983); Barker v. Stiles, 9 Ark. App. 273, 658 S.W.2d 416 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984).

SUBCHAPTER 5 — BENEFITS GENERALLY

SECTION.	SECTION.
11-10-501. Payment.	11-10-514. Disqualification — Discharge for misconduct.
11-10-502. Weekly benefit amount.	11-10-515. Disqualification — Failure or refusal to apply for or accept suitable work.
11-10-503. Weekly benefits for partial unemployment.	11-10-516. Disqualification — Refusal to report after layoff.
11-10-504. Maximum benefits payable.	11-10-517. Disqualification — Receipt of other remunerations.
11-10-505. Failure of base-period employer to respond.	11-10-518. Disqualification — Certain workers in training program excepted.
11-10-506. Seasonal employment and benefit rights.	11-10-519. Disqualification — Penalty for false statement or misrepresentation.
11-10-507. Eligibility — Conditions.	11-10-520. Claims — Posting of information by employer.
11-10-508. Eligibility — Labor dispute — Exceptions.	11-10-521. Claims — Filing — Notice to last employer.
11-10-509. Eligibility — Employees of educational institutions.	11-10-522. Claims — Determination.
11-10-510. Ineligibility — Service in sports or athletics.	11-10-523. Board of Review created — Administrative appeal — Claims.
11-10-511. Ineligibility — Aliens — Exception.	
11-10-512. Disqualification — Satisfaction.	
11-10-513. Disqualification — Voluntarily leaving work.	

SECTION.

- 11-10-524. Claims — Administrative appeal — Filing and hearing.
- 11-10-525. Claims — Administrative appeal — Review by Board of Review.
- 11-10-526. Claims — Administrative appeal — Procedure.
- 11-10-527. Claims — Conclusiveness of determinations and decisions.
- 11-10-528. Claims — Administrative appeal — Rule of decision.
- 11-10-529. Claims — Decision of Board of Review — Judicial review.
- 11-10-530. Claims — Administrative appeal — Representation.
- 11-10-531. Claims — Payment of benefits.
- 11-10-532. Claims — Recovery.
- 11-10-533. Claims — Investigation of claims filed by state employees.
- 11-10-534. Extended benefits — Definitions.

SECTION.

- 11-10-535. Extended benefits — Effect of provisions relating to regular benefits.
- 11-10-536. Extended benefits — Eligibility.
- 11-10-537. Extended benefits — Weekly amount.
- 11-10-538. Extended benefits — Total amount.
- 11-10-539. Extended benefits — Period and computations.
- 11-10-540. Extended benefits — Financing.
- 11-10-541. Extended benefits — Overpayments.
- 11-10-542. Extended benefits — Not payable under interstate benefit payment plan — Exceptions.
- 11-10-543. Extended benefits — Failure to accept or seek suitable work.
- 11-10-544. Reciprocal arrangements with state and federal agencies.

Preambles. Acts 1943, No. 174 contained a preamble which read:

“Whereas, The Arkansas Employment Security Act as now written contains no provisions applying to seasonal industries; and

“Whereas, There exists in this State a number of industries whose business is seasonal having a regular recurring period of decreased activity or inactivity in each calendar year; and

“Whereas, Employees in such industries know that employment therein will cease at the end of the seasonal period; and

“Whereas, The purpose of the act is to reduce the hazards of unemployment to workers only during periods when they normally are employed and expect to be employed; and

“Whereas, Said seasonal employees under the present act nevertheless obtain compensation during periods when they normally do not work or expect to work in such seasonal employment; and

“Whereas, The payment of such compensation is an unwarranted drain on the Unemployment Compensation Fund, to the prejudice of all other insured workers, and also tends to increase contribution

rates of all employees....”

Effective Dates. Acts 1943, No. 174, § 5: Mar. 6, 1943. Emergency clause provided: “The fund being unduly depleted by virtue of payments to seasonal employees, thereby prejudicing the security of future payments to regular insured employees, and this act being necessary for the public peace, health, and safety, an emergency is hereby declared to exist, and this act shall take effect and be in force from and after its passage and approval.”

Acts 1953, No. 162, § 22: July 1, 1953.

Acts 1955, No. 395, § 30: July 1, 1955.

Acts 1959, No. 13, § 4: July 1, 1959.

Acts 1959, No. 99, § 2: July 1, 1959.

Acts 1963, No. 93, § 13: July 1, 1963.

Acts 1967, No. 248, § 2: July 1, 1967.

Acts 1971, No. 35, § 25: approved Feb. 3, 1971. Emergency clause provided: “It is determined by the General Assembly of the State of Arkansas that an unemployment crisis exists in this State and in order to give better protection to the unemployed and their families extended benefits of the unemployment insurance program should be made available and to alleviate as much as possible the suffering and distress caused by unemployment, it is necessary to work in cooperation with

the federal government; and in order to receive the benefits of federal law and comply with the mandate of the United States Congress as provided in United States Public Law 91-373, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety, this Act shall take effect and be in force from and after its passage."

Acts 1972 (Ex. Sess.), No. 58, § 3: approved Mar. 6, 1972. Emergency clause provided: "In order to secure promptly the payment of benefits to those entitled, after giving both the employer and the claimant an opportunity to be heard as required by the United States Supreme Court in the case of California Department of Human Resources Development, et al. vs. Judith Java, et al.; 91 S. Ct. 1347 (1971), it is determined by the Legislature that this Act being necessary for the preservation of the public peace, health and safety an emergency should be and is hereby declared to exist; and this Act shall take effect and be in force from and after its passage."

Acts 1972 (Ex. Sess.), No. 65, § 3: Mar. 6, 1972. Emergency clause provided: "The passage of this Act being necessary to protect the rights of members or ex-members of the Armed Forces of the United States and prevent unwarranted hardship in obtaining benefits under the Employment Security Laws of Arkansas. It is hereby found and determined by the General Assembly meeting in Extraordinary Session that an emergency exists and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1973, No. 329, § 14: Mar. 14, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Employment Security laws of the State are in need of immediate clarification and revision in order to provide adequate protection to the working and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 154, § 2: Feb. 12, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that under present law, veterans of the armed forces receiving education allowances provided by Chapter 31 or Chapter 34 of Title 38 United States Code Annotated are not eligible to receive benefits under the Arkansas Employment Act and that such ineligibility works an undue hardship upon the veterans of this State. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 609, § 19: Mar. 28, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State are in need of immediate clarification and revision in order to provide adequate protection to the working and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1975, No. 627, § 3: Mar. 28, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that under the present law relating to unemployment compensation, persons who are retired involuntarily and are receiving retirement benefits under the Social Security Act or under a State-supported retirement system are not eligible to receive unemployment compensation when they are involuntarily retired; that this creates a severe hardship on such persons and denies to them unemployment compensation at a time when they probably need it most; that it is in the best interest of the citizens of this State that provision be made for permitting such persons to receive unemployment compensation at the earliest possible date and that this Act is designed to accomplish this purpose and should be given effect immediately. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation

of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1083, § 14: Jan. 30, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State of Arkansas are in need of immediate clarification and revision in order to provide adequate protection to the citizens of this State when they experience a period of unemployment and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1977, No. 366, § 14: Mar. 17, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State are in need of immediate clarification and revision in order to provide adequate protection to the employed and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1977, No. 376, § 21: approved Mar. 8, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to receive the benefits of Federal law and to comply with the mandate of the United States Congress as provided in United States Public Law 94-566 and in order to give better protection to the unemployed workers and their families, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, this Act shall take effect and be in force from and after its passage."

Acts 1977, No. 589, § 3: Mar. 22, 1977. Emergency clause provided: "It is hereby found and determined by the Seventy-First General Assembly that the Employment Security Act is in need of amend-

ment in order to clarify the basis for determination of eligibility to receive unemployment insurance benefits, and that to accomplish the purpose and intent of this Act, it is essential that this Act be in full force and effect from and after the date of its passage. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after the date of passage and approval."

Acts 1977, No. 925, § 6: July 1, 1977. Emergency clause provided: "It is hereby found and determined by the Seventy-First General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of the Act on July 1, 1977 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1977 could work irreparable harm upon the proper administration and providing of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety shall be in full force and effect from and after July 1, 1977."

Acts 1977 (Ex. Sess.), No. 25, § 4: Aug. 15, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to exempt coverage of local school districts from unemployment insurance coverage should the United States Supreme Court declare such coverage unconstitutional, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall take effect and be in force from and after its passage and approval."

Acts 1979, No. 252, § 5: July 1, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that the expeditious disposition of claims under the Workers' Compensation Law and of judicial review of adjudications made by agencies subject to the Administrative Procedure Act are of great interest and concern to the State of Arkansas and the parties involved in such pro-

ceedings; and that the present system of judicial review has not been adequate to insure the prompt and final determination of the issues involved in such matters and, as a result, there has been undue delay to the prejudice of the State and the parties involved. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the preservation of the public peace, health and safety, shall be in full force and effect from and after July 1, 1979."

Acts 1979, No. 492, § 18: Mar. 21, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to clarify certain provisions of the Employment Security Law that may be subject to misinterpretation and in order to bring the said Employment Security Law into conformity with the Federal Unemployment Tax Act as amended by P.L. 94-566, P.L. 95-19, and P.L. 95-216 so that Arkansas employers and workers may receive the benefits of the said Federal Unemployment Tax Act, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall take effect and be in full force and effect from and after its passage and approval."

Acts 1979, No. 922, § 18: Apr. 16, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to clarify certain provisions of the Employment Security Law that may be subject to misinterpretation and in order to bring the said Employment Security Law into conformity with the Federal Unemployment Tax Act as amended by P.L. 94-566, P.L. 95-19, and P.L. 95-216 so that Arkansas employers and workers may receive the benefits of the said Federal Unemployment Tax Act, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1981, No. 43, § 22: Feb. 10, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to restore and insure solvency to the State's unemployment insurance trust fund from which unemployment benefits are paid to unemployed Arkansas workers and in order to bring

the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 96-364 and P.L. 96-499 and with P.L. 95-524, 96-249 and 96-265 so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1981 (Ex. Sess.), No. 37, § 11: Dec. 2, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to bring the Arkansas Employment Security Law in conformity with the amendments to the Federal Unemployment Tax Act contained in Public Law 97-35 and to comply with other provisions of Federal law mandated by Public Law 97-35 so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and so that Arkansas workers may receive unemployment benefits when unemployed and qualified to receive such benefits, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1983, No. 482, § 41: Mar. 16, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to conform with P.L. 97-300 and to bring the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 97-248 and to insure the future solvency of the unemployment insurance fund so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1985, Nos. 8, 9, § 34: Jan. 30, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended by P.L. 98-21 and P.L. 98-369, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1987, No. 672, § 13: Apr. 7, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1083 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 753, § 30: July 1, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections to the Shared Work plan provisions which enable employers to avoid layoffs and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1987."

Acts 1989, No. 420, § 17: Mar. 8, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections, and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force after its passage and approval."

Acts 1991, No. 48, § 13: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1991."

Acts 1991, No. 100, § 58: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of this act should become effective at the beginning of the next fiscal year; that the next fiscal year begins on July 1, 1991 and this act may not go into effect until after July 1, 1991 unless an emergency is declared. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

Acts 1993, No. 6, § 21: Feb. 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 519, § 14: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

Acts 1997, No. 234, § 32: Feb. 21, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore an emergency

is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 250, § 258: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 1211 of 1995 established the procedure for all state boards and commissions to follow regarding reimbursement of expenses and stipends for board members; that this act amends various sections of the Arkansas Code which are in conflict with the Act 1211 of 1995; and that until this cleanup act becomes effective conflicting laws will exist. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1997, No. 1360, § 132: July 1, 1997. Emergency clause provided: "It is hereby found and determined by the Eighty-First General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1997 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1997 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety, Section

115 shall be in full force and effect from and after the date of passage and approval and the remainder of the Act shall be in full force and effect from and after July 1, 1997."

Acts 1999, No. 1116, § 19: April 5, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1537, § 140: July 1, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly, that the Constitution of the State of Arkansas prohibits the appropriation of funds for more than a two (2) year period; that the effectiveness of this Act on July 1, 1999 is essential to the operation of the agency for which the appropriations in this Act are provided, and that in the event of an extension of the Regular Session, the delay in the effective date of this Act beyond July 1, 1999 could work irreparable harm upon the proper administration and provision of essential governmental programs. Therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1999."

Acts 2001, No. 1367, § 11: Apr. 5, 2001 and No. 1467, § 7, Apr. 10, 2001. Emer-

gency clauses provided: "It is hereby found and determined by the Eighty-third General Assembly that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 353, § 3: Mar. 13, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2003, No. 1223, § 15: Apr. 10, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Department into conformity with the Federal Unemployment

Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2005, No. 902, § 15: Mar. 16, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible to bring the Arkansas Employment Security Department into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive tax credits under the Federal Unemployment Tax Act and Arkansas workers may receive unemployment benefits whenever they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2007, No. 490, § 18: Mar. 26, 2007. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that the act should go into effect as soon as possible in order to make needed technical changes; to enable the state to capture and utilize penalty and interest owing from claimants; and in order that the state might continue to be in compliance with the Federal Unemployment Tax Act, as amended. Therefore, an emergency is de-

clared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2009, No. 802, § 14: Apr. 3, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible in order to assure the prompt determination of claims for unemployment benefits and the continued provision of benefits and services to eligible persons. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2011, No. 1040, § 5: Apr. 1, 2011. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that eligible persons might lose unemployment benefits or have benefits delayed without this act; and that this act is immediately necessary to ensure the prompt determination of claims for unemployment benefits and the continued provision of unemployment benefits and services to eligible persons. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

RESEARCH REFERENCES

ALR. Mental, nervous, or psychological disorder: eligibility as affected by. 1 A.L.R.4th 802.

Leaving or refusing employment for religious reasons as barring unemployment compensation. 12 A.L.R.4th 611.

Leaving or refusing employment because of allergic reaction affecting unemployment compensation. 12 A.L.R.4th 629.

Right to unemployment compensation as affected by employee's refusal to work in areas where smoking is permitted. 14 A.L.R.4th 1234.

Right to unemployment compensation of one who quit job because not given enough work to keep busy. 15 A.L.R.4th 256.

Employee's refusal to take lie detector test as barring unemployment compensation. 18 A.L.R.4th 307.

Employee's acts or threat of physical violence as bar to unemployment compensation. 20 A.L.R.4th 637.

Eligibility as affected by voluntary resignation or retirement. 21 A.L.R.4th 317.

Right to unemployment compensation as affected by misrepresentation in original employment application. 23 A.L.R.4th 1272.

Termination of employment, known to be for a specific, limited duration, upon expiration of period, as voluntary. 30 A.L.R.4th 1201.

Conduct or activities of employees during off-duty hours as misconduct barring unemployment compensation benefits. 35 A.L.R.4th 691.

Eligibility for unemployment benefits of employee who attempts to withdraw resignation before leaving employment. 36 A.L.R.4th 395.

Harassment or other mistreatment as "good cause" justifying abandonment of employment. 40 A.L.R.4th 304.

Alcoholism or intoxication as ground for discharge justifying denial of unemployment compensation. 64 A.L.R.4th 1151.

Burden of proof as to voluntariness of separation. 73 A.L.R.4th 1093.

Liability for retaliation against at-will employee for public complaints or efforts relating to health or safety. 75 A.L.R.4th 13.

Eligibility of employee who left employment based on belief that involuntary discharge was imminent. 79 A.L.R.4th

528.

Employee's loss of employment because of refusal to submit to drug test as affecting right to unemployment compensation. 86 A.L.R.4th 309.

Propriety of telephone testimony or hearings in unemployment compensation proceedings. 90 A.L.R.4th 532.

Employer's state-law liability for withdrawing, or substantially altering, job offer for indefinite period before employee actually commences employment. 1 A.L.R.5th 401.

Eligibility as affected by claimant's refusal to work at particular times or on particular shifts for domestic or family reasons. 2 A.L.R.5th 475.

Eligibility for unemployment compensation as affected by claimant's voluntary separation or refusal to work alleging that the work is illegal or immoral. 41 A.L.R.5th 123.

Leaving employment to become self-employed or to go into business for oneself as affecting right to unemployment compensation. 45 A.L.R.5th 715.

Leaving employment in pursuit of other employment as affecting right to unemployment compensation. 46 A.L.R.5th 659.

What constitutes "agricultural" or "farm" labor within social security or unemployment compensation. 60 A.L.R.5th 459.

Leaving employment, or unavailability for particular job or duties, because of sickness or disability as affecting right to unemployment compensation. 68 A.L.R.5th 13.

Eligibility for unemployment compensation of employee who retires voluntarily. 75 A.L.R.5th 339.

Ark. L. Rev. Unemployment Compensation — Statutory Construction — Resumption of Benefits Following Labor Dispute. 12 Ark. L. Rev. 123.

Unemployment Compensation — Labor Dispute Ineligibility. 12 Ark. L. Rev. 416.

New Labor Dispute Ineligibility Conditions in Employment Security Act. 13 Ark. L. Rev. 349.

Am. Jur. 76 Am. Jur. 2d, Unemp. Comp., § 43 et seq.

C.J.S. 81 C.J.S., Soc. Sec., etc., § 211 et seq.

U. Ark. Little Rock L.J. Arkansas Law Survey, Nelson, Administrative Law, 7 U. Ark. Little Rock L.J. 141.

Stafford, Separation of Powers and Arkansas Administrative Agencies: Distinguishing Judicial Power and Legislative Power, 7 U. Ark. Little Rock L.J. 279.

11-10-501. Payment.

(a) All benefits provided in this chapter shall be payable from the Unemployment Compensation Fund.

(b) All benefits shall be paid through Department of Workforce Services offices, in accordance with such regulations as the Director of the Department of Workforce Services may prescribe.

History. Acts 1941, No. 391, § 3; 1971, No. 35, § 7; A.S.A. 1947, § 81-1104; Acts 1991, No. 100, § 25.

CASE NOTES

Cited: Lanoy v. Daniels, 271 Ark. 922, 611 S.W.2d 524 (1981); Jeffreys v. Everett, 6 Ark. App. 265, 640 S.W.2d 465 (1982); Young v. Everett, 6 Ark. App. 295, 641 S.W.2d 39 (1982); Thurman v. Everett, 6 Ark. App. 340, 642 S.W.2d 323 (1982); Farmer v. Everett, 8 Ark. App. 23, 648 S.W.2d 513 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984); Nichols v. Stiles, 11 Ark. App. 212, 668 S.W.2d 554 (1984); Razorback Vacuum v. Director, Ark. Emp. Sec. Dep't, 44 Ark. App. 19, 865 S.W.2d 649 (1993).

11-10-502. Weekly benefit amount.

(a) An insured worker's weekly benefit amount shall be an amount equal to one-twenty-sixth (1/26) of his or her total wages for insured work paid during the one (1) quarter of his or her base period in which the wages were highest.

(b)(1) A weekly benefit amount shall not be less than twelve percent (12%) of the state average weekly wage for insured employment for the preceding calendar year for benefit years beginning after June 30, 1987.

(2) However, effective July 1, 2012, the weekly minimum benefit amount established in subdivision (b)(1) of this section shall not be greater than eighty-one dollars (\$81.00).

(c)(1) A weekly benefit amount shall not be greater than sixty-six and two-thirds percent (66 $\frac{2}{3}$ %) of the state average weekly wage for insured employment for the previous calendar year for benefit years beginning after June 30, 1985.

(2) However, effective July 1, 2012, the weekly maximum benefit amount established in subdivision (c)(1) of this section shall not be greater than four hundred fifty-one dollars (\$451).

(d) Weekly benefit amounts that are not in even multiples of one dollar (\$1.00) shall be rounded to the next lower full dollar amount.

(e) On June 1 of each year, the Director of the Department of Workforce Services shall determine the average weekly wage for insured employment for the preceding calendar year in the following manner:

(1) The sum of the total monthly employment reported for the calendar year shall be divided by twelve (12) to determine the average monthly employment;

(2) The sum of the total wages reported for the previous calendar year shall be divided by the average monthly employment to determine the average annual wage; and

(3) The average annual wage shall be divided by fifty-two (52) to determine the average weekly wage for insured employment.

History. Acts 1941, No. 391, § 3; 1943, No. 138, § 26; 1943, No. 263, § 1; 1947, No. 398, § 2; 1949, No. 155, § 3; 1955, No. 395, § 5; 1959, No. 13, § 1; 1963, No. 93, § 4; 1971, No. 35, § 7; 1977, No. 366, § 5; 1981, No. 43, § 2; 1983, No. 482, § 7; 1985, No. 8, § 3; 1985, No. 9, § 3; A.S.A. 1947, § 81-1104; Acts 1987, No. 753, § 6; 1991, No. 48, § 2; 2001, No. 1367, § 3; 2001, No. 1757, § 8; 2003, No. 353, § 2; 2011, No. 861, § 1.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: "Nothing in the act,

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001."

Acts 2001, No. 1757, § 12, provided: "All laws and parts of laws expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999."

Amendments. The 2011 amendment added (b)(2); and rewrote (c)(2).

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Labor Law, Calculations for Un-

employment Benefits, 26 U. Ark. Little Rock L. Rev. 423.

CASE NOTES

Cited: Lanoy v. Daniels, 271 Ark. 922, 611 S.W.2d 524 (1981); Jeffreys v. Everett, 6 Ark. App. 265, 640 S.W.2d 465 (1982); Young v. Everett, 6 Ark. App. 295, 641 S.W.2d 39 (1982); Thurman v. Everett, 6 Ark. App. 340, 642 S.W.2d 323 (1982);

Farmer v. Everett, 8 Ark. App. 23, 648 S.W.2d 513 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984); Nichols v. Stiles, 11 Ark. App. 212, 668 S.W.2d 554 (1984).

11-10-503. Weekly benefits for partial unemployment.

(a) Any insured worker who is unemployed in any week as defined in § 11-10-214 and who meets the eligibility requirements of §§ 11-10-507 — 11-10-511 shall be paid, with respect to the week, an amount equal to his or her weekly benefit amount less that part of any earnings payable to him or her with respect to the week that is in excess of forty percent (40%) of his or her weekly benefit amount.

(b) The benefits, if not a multiple of one dollar (\$1.00), shall be rounded to the next lower multiple of one dollar (\$1.00).

History. Acts 1941, No. 391, § 3; 1943, No. 138, § 27; 1949, No. 155, § 3; 1955, No. 395, § 6; 1959, No. 13, § 2; 1963, No.

93, § 4; 1971, No. 35, § 7; 1983, No. 482, § 8; A.S.A. 1947, § 81-1104; Acts 2007, No. 490, § 3.

CASE NOTES

ANALYSIS

Eligibility.

Part-Time Employment.

Eligibility.

Worker who was physically disabled beyond a base period, and had not received wages for work performed for almost two years when he filed his unemployment compensation claim did not meet the eligibility requirements pursuant to this section. *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975).

Part-Time Employment.

A claimant who voluntarily leaves part-time employment is ineligible for further unemployment benefits only to the extent that his benefits would have been decreased by his part-time wages. *Hopkins v. Stiles*, 10 Ark. App. 77, 662 S.W.2d 177 (1983), *rev'd*, 282 Ark. 207, 666 S.W.2d 703 (1984).

Where it appeared from the record that, had claimant continued her part-time employment, her part-time wages were too small to have any effect on unemployment benefits which she was already receiving, claimant was entitled to unemployment benefits even though she voluntarily left part-time job without good cause. *Hopkins v. Stiles*, 10 Ark. App. 77, 662 S.W.2d 177 (1983), *rev'd*, 282 Ark. 207, 666 S.W.2d 703 (1984).

A claimant should not have been disqualified from receiving unemployment benefits as a result of her accepting part-time employment, when no suitable full-time employment was available. *Coit v. Stiles*, 12 Ark. App. 397, 678 S.W.2d 373 (1984), *aff'd*, 285 Ark. 212, 686 S.W.2d 405 (Ark. 1985).

Where the claimant failed to report part-time income on his unemployment compensation claim form, the Board of Review was justified in finding that the failure to report constituted a willful, false statement of a material fact, making the claimant liable for repayment of overpaid benefits under §§ 11-10-520 — 11-10-532; the failure to report was material, even though the amount of part-time income received by the claimant amounted to less than 40% of his weekly benefit. *Coy v. Stiles*, 13 Ark. App. 98, 679 S.W.2d 804 (1984).

Cited: *Lanoy v. Daniels*, 271 Ark. 922, 611 S.W.2d 524 (1981); *Jeffreys v. Everett*, 6 Ark. App. 265, 640 S.W.2d 465 (1982); *Young v. Everett*, 6 Ark. App. 295, 641 S.W.2d 39 (1982); *Thurman v. Everett*, 6 Ark. App. 340, 642 S.W.2d 323 (1982); *Farmer v. Everett*, 8 Ark. App. 23, 648 S.W.2d 513 (1983); *Stiles v. Hopkins*, 282 Ark. 207, 666 S.W.2d 703 (1984); *Nichols v. Stiles*, 11 Ark. App. 212, 668 S.W.2d 554 (1984).

11-10-504. Maximum benefits payable.

(a) The maximum potential benefits of any insured worker in a benefit year shall be the amount equal to whichever is the lesser of:

(1) Twenty-five (25) times his or her weekly benefit amount; or

(2) One-third (1/3) of his or her wages for insured work in his or her base period.

(b) If the total amount of benefits is not a multiple of his or her weekly benefit amount, it shall be computed to the next higher multiple of his or her weekly benefit amount.

History. Acts 1941, No. 391, § 3; 1943, No. 138, § 28; 1947, No. 398, § 2; 1949, No. 155, § 3; 1955, No. 395, § 7; 1959, No. 13, § 1; 1981, No. 43, § 3; 1983, No. 482, § 10; A.S.A. 1947, § 81-1104; Acts 2011, No. 861, § 2.

Amendments. The 2011 amendment substituted "Twenty-five (25)" for "Twenty-six (26)" in (a)(1).

CASE NOTES

Cited: Lanoy v. Daniels, 271 Ark. 922, 611 S.W.2d 524 (1981); Jeffreys v. Everett, 6 Ark. App. 265, 640 S.W.2d 465 (1982); Young v. Everett, 6 Ark. App. 295, 641 S.W.2d 39 (1982); Thurman v. Everett, 6 Ark. App. 340, 642 S.W.2d 323 (1982); Farmer v. Everett, 8 Ark. App. 23, 648 S.W.2d 513 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984); Nichols v. Stiles, 11 Ark. App. 212, 668 S.W.2d 554 (1984).

11-10-505. Failure of base-period employer to respond.

(a)(1)(A) A notice to the base-period employer shall be mailed or posted online, or both, promptly to each employer appearing on the claimant's monetary determination as a base-period employer.

(B) Employers may choose to receive and respond to notice under this section through the mail or online, or both.

(2)(A) If any base-period employer fails to respond to the notice to the base-period employer within fifteen (15) calendar days, the employer shall be deemed to have waived the employer's right to respond.

(B) The Director of the Department of Workforce Services may accept the statement given by the claimant as his or her reason for separation from the base-period employer and may base his or her determination on the statement given by the claimant.

(b) The director shall adopt rules necessary to carry out this section.

(c) On or before January 1, 2012, the director shall make available on the website of the Department of Workforce Services a program that will allow employers the option to receive and respond to notice under this section.

History. Acts 1941, No. 391, § 3; 1981, No. 43, § 5; A.S.A. 1947, § 81-1104; Acts 2011, No. 1229, § 1.

Amendments. The 2011 amendment inserted "or posted online, or both" in (a)(1)(A); inserted (a)(1)(B); substituted "fifteen (15) calendar days" for "such time as the Director of the Arkansas Employ-

ment Security Department shall by regulation prescribe" in (a)(2)(A); substituted "Director of the Department of Workforce Services" for "director" in (a)(1)(B); substituted "shall adopt rules" for "is authorized to establish such rules and regulations as may be" in (b); and added (c).

CASE NOTES

Cited: Lanoy v. Daniels, 271 Ark. 922, 611 S.W.2d 524 (1981); Jeffreys v. Everett, 6 Ark. App. 265, 640 S.W.2d 465 (1982); Young v. Everett, 6 Ark. App. 295, 641 S.W.2d 39 (1982); Thurman v. Everett, 6 Ark. App. 340, 642 S.W.2d 323 (1982); Farmer v. Everett, 8 Ark. App. 23, 648 S.W.2d 513 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984); Nichols v. Stiles, 11 Ark. App. 212, 668 S.W.2d 554 (1984).

11-10-506. Seasonal employment and benefit rights.

(a)(1) As used in this section, the term "seasonal industry" means an industry in which, because of the seasonal nature thereof, it is customary to lay off forty percent (40%) or more of the average monthly number of workers for at least four (4) consecutive months during a

regularly recurring period of each year and in which industry it is highly impracticable or impossible to continue seasonal operations throughout a period or periods of one (1) year in length. However, the total cessation of operations is not a prerequisite to classification as a seasonal industry.

(2)(A) After a study of previous employment records, and after investigation and hearing, the Director of the Department of Workforce Services shall determine the normal seasonal period or periods during which workers are ordinarily employed for the purpose of carrying on seasonal operations in each seasonal industry. Until the determination by the director, no industry shall be deemed to be seasonal. The director may initiate a study of an industry upon his or her own motion or upon a request filed with the director by any employing unit or person that would be affected by any determination made as a result of such a study. If a study is made, it shall be mandatory for the director to make his or her determination and report thereon within ninety (90) days after written application for the determination has been filed. If the director initiates the study of an industry upon his or her own motion and finds that the industry meets the seasonal requirements set forth in this section, he or she shall make his or her determination and report within ninety (90) days after the study is initiated. In either event, the industry shall be classified as a seasonal industry effective on the January 1 immediately following the date of the director's determination. Provided that, any employer who is classified as a seasonal employer under these provisions may make a written request to the director asking not to be treated as a seasonal employer. If the request is approved, treatment as a seasonal employer will cease effective January 1 of the following calendar year.

(b)(1) The director shall conduct, from time to time, studies of industries previously determined to be seasonal for the purpose of determining whether they should continue to be so classified.

(2) If, after study, investigation, and hearing, the director finds that an industry no longer meets the seasonal requirements set forth herein, he or she shall issue a determination to that effect within ninety (90) days after the study was initiated.

(3) The industry shall cease to be classified as a seasonal industry effective on the January 1 immediately following the date of determination.

(c)(1) The term "seasonal worker" means an individual who is employed in a seasonal industry, except that the term shall not include workers in industries where employment continues substantially throughout the year.

(2) Any individual having earnings in a seasonal industry having a seasonal operating period within the limits shown in Column A of the table below and who has base period wages earned in the seasonal industry in the nonoperating season of the seasonal industry in an amount equal to the amount specified on the corresponding line of

Column B of this table shall be considered as having employment which continues substantially throughout the year and shall not be considered a seasonal worker.

A	B
Operating Period of Seasonal Industry	Wages Earned in Seasonal Industry During Nonoperating Period
7 - 8 Months	24 Times Weekly Benefit Amount
2 - 6 Months	30 Times Weekly Benefit Amount

(d) For purposes of this section, the term “average monthly number of workers” means the aggregate number of workers employed in the industry during the pay period that includes the twelfth day of each month in the peak period of operation divided by the number of months during the period.

(e) The director shall prescribe fair and reasonable general rules consistent with this chapter and not inconsistent with general law applicable to seasonal workers for determining the period during which benefits shall be payable to them. The director may prescribe fair and reasonable general rules with respect to such other matters relating to benefits for seasonal workers as the director finds necessary and consistent with respect to such other matters relating to benefits for seasonal workers as the director finds necessary and consistent with general law.

(f) The business of exploring for and the mining of coal and other minerals for use as fuel shall not be deemed to be a seasonal industry as defined in this section.

History. Acts 1941, No. 391, § 3; 1943, No. 174, §§ 1, 3; 1953, No. 162, § 1; 1981, No. 43, § 4; 1983, No. 482, § 12; A.S.A. 1947, §§ 81-1104, 81-1110; Acts 1989, No. 420, § 5; 1991, No. 100, § 26; 2001, No. 1367, § 4.

CASE NOTES

Cited: Lanoy v. Daniels, 271 Ark. 922, 611 S.W.2d 524 (1981); Jeffreys v. Everett, 6 Ark. App. 265, 640 S.W.2d 465 (1982); Young v. Everett, 6 Ark. App. 295, 641 S.W.2d 39 (1982); Thurman v. Everett, 6 Ark. App. 340, 642 S.W.2d 323 (1982); Farmer v. Everett, 8 Ark. App. 23, 648 S.W.2d 513 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984); Nichols v. Stiles, 11 Ark. App. 212, 668 S.W.2d 554 (1984).

11-10-507. Eligibility — Conditions.

An insured worker shall be eligible to receive benefits with respect to any week only if the Director of the Department of Workforce Services finds that:

(1) CLAIM FOR BENEFITS. He or she has made a claim for benefits with respect to such week in accordance with such regulations as the director may prescribe;

(2) **REGISTRATION AND REPORTING.** He or she has registered for work at and thereafter continued to report to a Department of Workforce Services office in accordance with such regulations as the director may prescribe. The director, by regulation, may waive or alter either or both of the requirements of this subdivision as to individuals attached to regular jobs and as to such other types of cases or situations with respect to which he or she finds that compliance with these requirements would be oppressive or would be inconsistent with the purpose of this chapter. However, no such regulations shall conflict with § 11-10-501;

(3) **ABLE TO WORK AND AVAILABLE FOR WORK.**

(A) The worker is unemployed, is physically and mentally able to perform suitable work, and is available for such work. Mere registration and reporting at a local employment office shall not be conclusive evidence of ability to work, availability for work, or willingness to accept work unless the individual is doing those things which a reasonably prudent individual would be expected to do to secure work. In determining suitable work under this section and for refusing to apply for or accept suitable work under § 11-10-515, part-time work shall be considered suitable work unless the majority of weeks of work in the period used to determine monetary eligibility is from full-time work.

(B) Persons who are on layoff and who are attending a state vocational school for the purpose of upgrading or improving their job skills shall be considered available for employment so long as they make reasonable efforts to secure employment unless, or until, they refuse suitable employment or referral or recall to suitable work. However, no otherwise eligible individual shall be denied benefits with respect to any week in which he or she is in training with the approval of the director by reason of the application of the provisions of subdivision (3)(A) of this section relating to availability for work.

(C) For the purpose of this subdivision (3), the approval by the director of training for an individual shall be based on the following considerations:

(i) The claimant's skills must be obsolete, or the demands for his or her skills in his or her labor market must be minimal and not likely to improve;

(ii) The claimant must possess aptitudes or skills which can be usefully supplemented within a short time by retraining;

(iii) The training must be for an occupation for which there is a substantial and recurring demand; and

(iv) The claimant must produce evidence of continued attendance and satisfactory progress.

(D) In the event of the death of an individual's immediate family member, the eligibility requirements of availability for that individual shall be waived for the day of the death and for six (6) consecutive calendar days thereafter. For the purposes of this subdivision (3), "immediate family member" means a spouse, child, parent, brother, sister, grandchild, or grandparent of the individual.

(E) An individual on short-term layoff who expects to be recalled by his or her employer to a full-time job and whose employer intends to recall the individual to a full-time job within ten (10) weeks after the initial date of his or her layoff shall not be required during the layoff to register for work at a department office or to seek other work.

(F) Any individual who is not actively engaged in seeking work because he or she is before any court of the United States or of any state pursuant to a lawfully issued summons to appear for jury duty shall not be disqualified under this subdivision (3).

(G) No individual shall be considered unavailable for work under this subdivision (3) during the entire week if he or she is required to withdraw from the labor market for less than four (4) days of the week because of a compelling personal emergency.

(H) The individual participates in reemployment services, such as job search assistance services, if the individual has been determined to be likely to exhaust regular benefits and to need reemployment services pursuant to a profiling system established by the director, as provided for in § 4 of Pub. L. No. 103-152, unless the director determines that:

(i) The individual has completed such services; or

(ii) There is justifiable cause for the claimant's failure to participate in such services;

(4) **WAITING PERIOD.** He or she has been unemployed for a waiting period of one (1) week. A week shall not be counted as a week of unemployment for the purposes of this subdivision (4):

(A) Unless it occurs within the benefit year which includes the week with respect to which he or she claims payment of benefits;

(B) If benefits have been paid with respect thereto; and

(C) Unless the individual was eligible for benefits with respect thereto as provided in this section and §§ 11-10-512 — 11-10-519, except for the requirements of this subdivision (4); and

(5)(A) **QUALIFYING WAGES.** For any benefit year, he or she has during his or her base period been paid wages in at least two (2) quarters of his or her base period for insured work, and the total wages paid during his or her base period equal not less than thirty-five (35) times his or her weekly benefit amount.

(B) **REQUALIFYING WAGES.** For all benefit years, an individual shall not requalify on a succeeding benefit year claim unless he or she has been paid wages for insured work equal to not less than thirty-five (35) times his or her weekly benefit amount and has wages paid for insured work in at least two (2) calendar quarters of his or her base period and, subsequent to filing the claim that established his or her previous benefit year, he or she has had insured work and was paid wages for work equal to eight (8) times his or her weekly benefit amount.

(C) With respect to weeks of unemployment, wages for insured work shall include wages paid for previously uncovered services. For the purposes of this section, the term "previously uncovered services" means services:

(i) Which were not employment as defined in § 11-10-210(a) and were not services covered pursuant to § 11-10-210(d) at any time during the one-year period; and

(ii) Which are:

(a) Agricultural labor, as defined in § 11-10-210(f)(1); or

(b) Services performed by an employee of a political subdivision of this state, as provided in § 11-10-210(a)(2)(B), or by an employee of a nonprofit educational institution which is not an institution of higher education, as provided in § 11-10-210(a)(3), except to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 was paid on the basis of such services.

(D) For the purpose of this subdivision (5), wages shall be counted as “wages for insured work” for benefit purposes with respect to any benefit year only if the benefit year begins subsequent to the date on which the employing unit by which the wages were paid has satisfied the conditions of § 11-10-209 with respect to becoming an employer.

History. Acts 1941, No. 391, § 4; 1943, No. 138, § 29; 1947, No. 398, § 3; 1949, No. 155, § 4; 1953, No. 162, § 2; 1959, No. 13, § 3; 1963, No. 93, § 5; 1971, No. 35, § 8; 1973, No. 329, § 5; 1975 (Extended Sess., 1976), No. 1083, § 5; 1977, No. 376, § 7; 1979, No. 492, § 4; 1979, No. 922, § 4; 1981, No. 43, §§ 6, 7; 1983, No. 482, §§ 13, 14; 1985, No. 8, § 5; 1985, No. 9, § 5; A.S.A. 1947, § 81-1105; reen. Acts 1987, No. 672, § 4; Acts 1987, No. 753, § 12; 1989, No. 420, § 6; 1991, No. 48, § 3; 1991, No. 100, § 27; 1993, No. 6, § 5; 1995, No. 519, § 5; 1999, No. 1116, § 9; 2003, No. 1223, § 4; 2009, No. 653, §§ 2, 3; 2009, No. 802, § 3; 2011, No. 861, § 3.

A.C.R.C. Notes. Part of this section was reenacted by Acts 1987, No. 672, § 4.

Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Amendments. The 2011 amendment substituted “thirty-five (35)” for “twenty-seven (27)” in (5)(A) and (5)(B); and substituted “eight (8)” for “three (3)” in (5)(B).

U.S. Code. As to Title II of the Emergency Jobs and Unemployment Assistance Act of 1974, referred to in this section, see notes under 26 U.S.C. § 3304.

Public Law 103-152, § 4, referred to in this section, is codified as 42 U.S.C. §§ 503 and 504.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General As-

sembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS

Availability for Work.
Efforts to Secure Work.
Eligibility Generally.
Findings.
Registration.
Social Security Disability.
State Vocational School.
Suitable Work.

Availability for Work.

Company resisting efforts of claimants to obtain unemployment benefits has burden to go forward to overcome the prima facie case made by the determination of the examiner that claimants were available for work. *Little Rock Furn. Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957).

Mere fact that applicants for unemploy-

ment payments were available for picket duty did not of itself show that they were unavailable for employment. *Monsanto Chem. Co. v. Thornbrough*, 229 Ark. 362, 314 S.W.2d 493 (1958).

Where applicant for unemployment benefits refused to accept offered employment contending the rules of the labor union to which he belongs would subject him to a fine and possible discharge from the union for accepting a job paying less than the union scale, he was not protected from disqualification for unemployment benefits as he was not required to resign from the labor organization. *Thornbrough v. Stewart*, 232 Ark. 53, 334 S.W.2d 699 (1960).

An unemployed person, partially disabled by an industrial injury, whose physician has released her for light-duty work, may still be able to compete in the labor market and may qualify for unemployment benefits as one available for work, although she may be receiving, under the Workers' Compensation Law, partial permanent disability benefits as distinguished from temporary total disability benefits during the period of recuperation. *Ross v. Daniels*, 266 Ark. 1056, 599 S.W.2d 390 (Ct. App. 1979).

Evidence sufficient to find that claimant was not available for work. *Loftin v. Daniels*, 268 Ark. 611, 594 S.W.2d 578 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Lanoy v. Daniels*, 271 Ark. 922, 611 S.W.2d 524 (1981); *Duvall v. Daniels*, 1 Ark. App. 50, 613 S.W.2d 116 (1981); *Price v. Director of Labor*, 4 Ark. App. 341, 631 S.W.2d 22 (1982).

There is no exception to the availability or search for work requirement on the basis of "good cause" for personal reasons. *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980).

The availability requirement cannot be read out of § 11-10-214(a) to allow pro-rata benefits to the worker under a liberal interpretation of the statute. *Lanoy v. Daniels*, 271 Ark. 922, 611 S.W.2d 524 (1981).

Evidence sufficient to find that claimant was available for work. *Washington v. Everett*, 6 Ark. App. 28, 639 S.W.2d 57 (1982).

Where claimants have no more than a hope of future employment with employer, they are available for work as required by

this section. *Sanyo Mfg. Corp. v. Stiles*, 17 Ark. App. 20, 702 S.W.2d 421 (1986).

Arkansas Board of Review erred by determining that appellant was not eligible for unemployment benefits because he did not have transportation or a driver's license; as long as there existed employment that did not require appellant to have a driver's license, he was available to work. *Buchanan v. Dir. of Ark. Empl. Sec. Dep't*, 91 Ark. App. 35, 207 S.W.3d 567 (2005).

Denial of unemployment benefits to the employee was appropriate pursuant to subdivision (3)(A) of this section because her own statements and testimony undermined her present contentions that she was currently available for work. In part, the employee testified that she was not looking for work because she was devoting all of her time to school and that it would be difficult to work and go to school; she also testified that she was only available to work a couple of hours a day. *Hayden v. Dir., Dep't of Workforce Servs.*, 2010 Ark. App. 298, — S.W.3d — (2010).

Efforts to Secure Work.

Evidence sufficient to find that claimant was doing those things a reasonably prudent individual would be expected to do to secure work. *Terry Dairy Prods. Co. v. Cash*, 224 Ark. 576, 275 S.W.2d 12 (1955); *Hefton v. Daniels*, 270 Ark. 857, 606 S.W.2d 379 (1980); *Rainbolt v. Everett*, 3 Ark. App. 48, 621 S.W.2d 877 (1981).

Evidence insufficient to find that claimant was doing those things a reasonably prudent individual would be expected to do to secure work. *Faught v. Daniels*, 267 Ark. 784, 590 S.W.2d 79 (Ct. App. 1979); *Eubanks v. Daniels*, 267 Ark. 888, 591 S.W.2d 673 (Ct. App. 1979); *Teegarden v. Director, Ark. Emp. Sec. Div.*, 267 Ark. 893, 591 S.W.2d 675 (Ct. App. 1979); *Tate v. Director, Ark. Emp. Sec. Div.*, 267 Ark. 1081, 593 S.W.2d 501 (Ct. App. 1980); *Sanders v. Daniels*, 269 Ark. 672, 599 S.W.2d 770 (Ct. App. 1980); *Everett v. Jones*, 277 Ark. 162, 639 S.W.2d 739 (1982).

Eligibility Generally.

Claimants held to be eligible for benefits. *Harmon v. Laney*, 239 Ark. 603, 393 S.W.2d 273 (1965); *Springer v. Daniels*, 1 Ark. App. 103, 613 S.W.2d 121 (1981); *Prosser v. Everett*, 4 Ark. App. 344, 631

S.W.2d 24 (1982); *Haywood v. Everett*, 5 Ark. App. 140, 633 S.W.2d 395 (1982).

Claimant held not eligible for benefits. *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Alexander v. Walnut Fork Design*, 267 Ark. 1130, 593 S.W.2d 493 (Ct. App. 1980); *McVey v. Daniels*, 270 Ark. 409, 605 S.W.2d 483 (1980).

Unemployment benefits are not for those individuals who are voluntarily unemployed or incapable of working due to illness or family responsibilities which preclude them from accepting employment within their capabilities. *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (1980).

Court reversed a finding that an employee engaged in misconduct under § 11-10-514(a)(1) by not requesting using accrued leave time for the military leave because (1) the employer allowed its employees to use accrued vacation or sick time for military leave, (2) the employee had done so with no problem in the past, (3) there was no written policy that the employee was required to request using accrued leave time for his military leave, and (4) there was no evidence that the employee intentionally disregarded company policy or procedure; thus, the matter was remanded with instructions that an order be entered awarding the employee benefits. *Maxfield v. Dir., Ark. Empl. Sec. Dep't*, 84 Ark. App. 48, 129 S.W.3d 298 (2003).

Findings.

The board's findings of fact are conclusive when supported by substantial evidence. *Terry Dairy Prods. Co. v. Cash*, 224 Ark. 576, 275 S.W.2d 12 (1955).

Registration.

Where plaintiff was declared ineligible to receive benefits and thereafter did not report and register at the Employment Security Division office, trial courts' finding that plaintiff's appeal from the commissioner's rulings of ineligibility made it unnecessary for plaintiff to thereafter report and register weekly was error since the making of a weekly claim for benefits is a prerequisite to the right of an insured worker to claim benefits. *Commissioner, Ark. Dep't of Labor v. Mitchell*, 263 Ark. 458, 565 S.W.2d 431 (1978).

Social Security Disability.

Substantial evidence supported a Social Security administrative law judge's find-

ing, that an Arkansas disability claimant was able to work during the period of time that she was laid off and collected unemployment benefits, because pursuant to this section, only individuals who were physically and mentally able to perform work were eligible to collect unemployment benefits. *Thompkins v. Astrue*, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 92255 (W.D. Ark. Dec. 12, 2007).

State Vocational School.

The legislature did not intend that the scope of the phrase state vocational school be interpreted to include any vocational school within the state attended for the purpose of upgrading or improving the worker's job skills; the phrase was intended to include only state-sponsored, tax-supported, vocational schools. Thus, where an unemployment benefits claimant attended nursing assistant school at a private hospital, she was not attending a state vocational school, and was not fully available for work. *Blaylock v. Everett*, 6 Ark. App. 323, 641 S.W.2d 728 (1982).

Suitable Work.

The duty and obligation of an unemployed individual, who has made application for benefits, to accept available and suitable work may exist regardless of whether the work is temporary employment or full-time employment; moreover, suitability of work does not require that the job offered must be equal in every respect to the prior working conditions, that the pay be equal to or better than the previous wage scale. *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (1980).

Where only employment offered claimant involved a 50 percent salary reduction, it was not suitable employment under the circumstances. *Price v. Everett*, 2 Ark. App. 98, 616 S.W.2d 766 (1981).

Cited: *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950); *Andrews v. Victor Metal Prods. Corp.*, 237 Ark. 540, 374 S.W.2d 816 (1964); *Daves v. Sears Roebuck & Co.*, 255 Ark. 723, 502 S.W.2d 106 (1973); *Whitford v. Daniels*, 263 Ark. 222, 563 S.W.2d 469 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Lemay v. Daniels*, 269 Ark. 683, 599 S.W.2d 771 (Ct. App. 1980); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983).

11-10-508. Eligibility — Labor dispute — Exceptions.

(a) If so found by the Director of the Department of Workforce Services, no individual may serve a waiting period or be paid benefits for the duration of any period of unemployment if he or she lost his or her employment or has left his or her employment by reason of a labor dispute other than a lockout at the factory, establishment, or other premises at which he or she was employed, regardless of whether or not the labor dispute causes any reduction or cessation of operations at the factory, establishment, or other premises of the employer, as long as the labor dispute continues, and thereafter for such reasonable period of time, if any, as may be necessary for that factory, establishment, or other premises to resume normal operation.

(b) However, this section shall not apply if it is shown that the individual is not participating in or directly interested in the labor dispute and he or she does not belong to a grade or class of workers of which, immediately before the commencement of the labor dispute, there were members employed at the factory, establishment, or other premises at which the labor dispute occurs, any of whom are participating in or directly interested in the labor dispute.

(c) If in any case, separate branches of work, which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purpose of this section, be deemed to be a separate factory, establishment, or other premises.

History. Acts 1941, No. 391, § 4; 1955, No. 395, § 8; 1959, No. 99, § 1; A.S.A. 1947, § 81-1105.

CASE NOTES**ANALYSIS**

Purpose.
Additional Unemployment.
Cessation of Operations.
Labor Dispute Defined.
Labor Dispute Terminated.
Lockout.

Purpose.

The purpose of the Employment Security Law is to relieve some of the economic consequences of involuntary unemployment, and not to penalize or reward either the employee or employer engaged in a legitimate labor dispute; thus the law's only concern with labor disputes is for the determination, when a claim is filed for benefits, whether claimant's unemployment is voluntary or involuntary. City of

Fort Smith v. Moore, 269 Ark. 617, 599 S.W.2d 750 (1980).

Additional Unemployment.

Employees temporarily laid off because of lack of work when a strike goes into effect who are then notified by their employer to return to work, but refuse to do so because they are members of the striking union and refuse to cross the picket lines, lost their employment because of a labor dispute in which they were involved and were not entitled to unemployment benefits during the strike. Fort Smith Chair Co. v. Laney, 238 Ark. 636, 383 S.W.2d 666 (1964).

Employees who were laid off and drawing compensation when their union went on strike were entitled to continue drawing compensation benefits until such time as the employer notified them to return to

work and they refused to do so. *Harding Glass Co. v. Crutcher*, 244 Ark. 618, 426 S.W.2d 403 (1968).

Where employees had been told that a boiler had blown up and that they would be notified to return to work as soon as it was repaired, but employees' union thereafter called a strike in which employees actively participated by picketing the plant, the employees were properly denied unemployment compensation. *Tosh v. A.T.I., Inc.*, 259 Ark. 228, 534 S.W.2d 242 (1976).

Cessation of Operations.

Where employees initially left their jobs by reason of a labor dispute and employer closed the plant, employees were not entitled to benefits as there was a possibility of future negotiations, since section specifies that there is still a labor dispute regardless of cessation of operations. *Guinn v. Arkla Chem. Corp.*, 253 Ark. 1029, 490 S.W.2d 442 (1973).

Labor Dispute Defined.

Since the term labor dispute used in this section is not specifically defined in Arkansas by statute or court decision all of the facts and circumstances in each case must be considered in determining whether a labor dispute exists or has terminated within the meaning of this section. *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979), *aff'd*, 268 Ark. 375, 597 S.W.2d 71 (Ark. 1980).

Labor Dispute Terminated.

Evidence sufficient to find that claimants were eligible for benefits because they were no longer unemployed by reason of a labor dispute. *Randall, Burkart/Randall Div. of Textron, Inc. v. Daniels*, 266 Ark. 1060, 599 S.W.2d 392 (1979), *aff'd*, 268 Ark. 375, 597 S.W.2d 71 (Ark. 1980).

When employees cease all strike activity and apply unconditionally for reinstatement and the employer has resumed normal operations, the labor dispute is regarded as terminated and claimants may not be disqualified under this section. *City of Fort Smith v. Moore*, 269 Ark. 617, 599 S.W.2d 750 (1980); *Arlington Hotel v. Everett*, 5 Ark. App. 92, 633 S.W.2d 46 (1982).

Lockout.

Where claimants' lockout theory was not developed at hearings, suggestion that theory be considered on remand would result in piece-meal litigation and case would not be sent back for that purpose. *Guinn v. Arkla Chem. Corp.*, 253 Ark. 1029, 490 S.W.2d 442 (1973).

As used in this section, the term "lockout" is defined as the cessation of furnishing of work to employees or withholding work from them in effort to get more desirable terms for employer. *Jacks v. Stiles*, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

There was substantial evidence to support the Board of Review's decision that the employees left their employment by reason of a labor dispute and denied them benefits under this section where the gates were not locked and work was available for employees who wanted to work. *Jacks v. Stiles*, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

Cited: *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950); *Andrews v. Victor Metal Prods. Corp.*, 237 Ark. 540, 374 S.W.2d 816 (1964); *Daves v. Sears Roebuck & Co.*, 255 Ark. 723, 502 S.W.2d 106 (1973); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Whitford v. Daniels*, 263 Ark. 222, 563 S.W.2d 469 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983).

11-10-509. Eligibility — Employees of educational institutions.

(a) With respect to service performed in an instructional, research, or principal administrative capacity as an employee of an educational institution, benefits shall not be paid based on services for any week of unemployment commencing during the period between two (2) successive academic years or terms, during a similar period between two (2) regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract to any individual if:

(1) The individual performs the services in the first of the academic years or terms; and

(2) There is a contract or a reasonable assurance that the individual will perform services in any such capacity as an employee of any educational institution in the second of the academic years or terms.

(b)(1) With respect to services performed in any other capacity as an employee of an educational institution, benefits shall not be paid on the basis of services to any individual for any week of unemployment that commences during a period between two (2) successive academic years or terms if:

(A) The individual performs the services in the first of the academic years or terms; and

(B) There is a reasonable assurance that the individual will perform the services in the second of the academic years or terms.

(2)(A) If compensation is denied to an individual under subdivision (b)(1) of this section and the individual was not offered an opportunity to perform the services as an employee of the educational institution for the second of the academic years or terms, the individual, if otherwise eligible, is entitled to a retroactive payment of compensation for each week for which the individual filed a timely claim for compensation and for which compensation was denied solely by reason of subdivision (b)(1) of this section.

(B) The individual shall apply for the retroactive payment described in subdivision (b)(2)(A) of this section within two (2) weeks after receipt of notification from the educational institution that he or she will not have an opportunity to perform the services at that educational institution in the second academic year or term.

(c) With respect to any services described in subsection (a) or (b) of this section, compensation payable on the basis of these services shall not be payable to any individual for any week of unemployment that commences during an established and customary vacation period or holiday recess if:

(1) The individual performs these services in the period immediately before a vacation or holiday recess; and

(2) There is a reasonable assurance that the individual will perform the services in the period immediately following the vacation period or holiday recess.

(d)(1) With respect to any services described in subsections (a) and (b) of this section, compensation payable on the basis of services in any such capacity shall be denied as specified in subsections (a)-(c) of this section to any individual who performed the services in an educational institution while in the employ of an educational service agency.

(2) For purposes of this subdivision, the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one (1) or more educational institutions.

History. Acts 1941, No. 391, § 4; 1977, No. 376, § 8; 1977, No. 589, § 1; 1977 (Ex. Sess.), No. 25, § 1; 1979, No. 492, § 5; 1979, No. 922, § 5; 1981, No. 43, §§ 6, 7; 1983, No. 482, § 15; 1985, No. 8, § 6; 1985, No. 9, § 6; A.S.A. 1947, § 81-1105; Acts 1987, No. 753, § 13; 1989, No. 420,

§ 7; 1997, No. 1360, §§ 101, 102; 1999, No. 1116, § 10; 1999, No. 1537, § 126; 2007, No. 490, § 4; 2009, No. 653, § 4; 2011, No. 1040, § 1.

Amendments. The 2011 amendment substituted “as an employee of” for “for” in (a), (a)(2), (b)(1), and (b)(2)(A).

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Between-Terms Time Period.
Unemployment Compensation.

Between-Terms Time Period.

Where the Arkansas Board of Review denied a worker unemployment benefits during a between-terms time period because the worker taught part-time at an educational institution, the Board misapplied subsection (a) of this section; as a result, the Board’s decision, based on an erroneous view of the law, was arbitrary and capricious. *Kuhn v. Dir. Ark. Empl. Sec. Div.*, 83 Ark. App. 201, 121 S.W.3d 517 (2003).

Unemployment Compensation.

Arkansas Board of Review erred in finding that an employee was eligible for unemployment compensation benefits because the employee was hired by a private employer to perform services “for” an educational institution, a school district, pursuant to subsection (a) of this section; the employee testified that she performed the same services for the same school as an

employee of that school before the school began outsourcing the hiring of its substitute teachers to the employer, and she also testified that the services she performed as a substitute teacher were not any different after the employer took over. *SubTeach USA v. Williams*, 2010 Ark. 400, — S.W.3d — (2010).

There is no express requirement in the text of subsection (a) of this section that the person who performs the services “be employed by” an educational institution; rather, the requirement imposed by the text of the statutory language is that the service be performed “for an educational institution.” *SubTeach USA v. Williams*, 2010 Ark. 400, — S.W.3d — (2010).

Cited: *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950); *Andrews v. Victor Metal Prods. Corp.*, 237 Ark. 540, 374 S.W.2d 816 (1964); *Daves v. Sears Roebuck & Co.*, 255 Ark. 723, 502 S.W.2d 106 (1973); *Whitford v. Daniels*, 263 Ark. 222, 563 S.W.2d 469 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983).

11-10-510. Ineligibility — Service in sports or athletics.

Benefits shall not be paid to any individual on the basis of any services substantially all of which consist of participating in sports or athletic events or training or preparing to so participate for any week that commences during the period between two (2) successive sport seasons or similar periods if the individual performed the services in the first of the seasons or similar periods and there is a reasonable assurance that the individual will perform these services in the later of such seasons or similar periods.

History. Acts 1941, No. 391, § 4; 1975, No. 721, § 1; 1977, No. 376, § 9; A.S.A. 1947, § 81-1105.

CASE NOTES

Cited: *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950); *Andrews v. Victor Metal Prods. Corp.*, 237 Ark. 540, 374 S.W.2d 816 (1964); *Daves v. Sears Roebuck & Co.*, 255 Ark. 723, 502 S.W.2d 106 (1973); *Whitford v. Daniels*, 263 Ark. 222, 563 S.W.2d 469 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983).

11-10-511. Ineligibility — Aliens — Exception.

(a) Benefits shall not be payable on the basis of services performed by an alien unless the alien is an individual who was lawfully admitted for permanent residence at the time the services were performed, was lawfully present for purposes of performing those services, or was permanently residing in the United States under color of law at the time the services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of § 212(d)(5) of the Immigration and Nationality Act.

(b)(1) Any data or information required of individuals applying for benefits to determine whether benefits are not payable to them because of their alien status shall be uniformly required from all applicants for benefits.

(2) In the case of an individual whose application for benefits would otherwise be approved, no determination that benefits to the individual are not payable because of his alien status shall be made except upon a preponderance of the evidence.

History. Acts 1941, No. 391, § 4; 1977, No. 376, § 10; 1979, No. 492, § 6; A.S.A. 1947, § 81-1105; Acts 1993, No. 6, § 6. Immigration and Nationality Act, referred to in this section, is codified as 8 U.S.C. § 1182.

U.S. Code. Section 212(d)(5) of the

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Cited: *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950); *Andrews v. Victor Metal Prods. Corp.*, 237 Ark. 540, 374 S.W.2d 816 (1964); *Daves v. Sears Roebuck & Co.*, 255 Ark. 723, 502 S.W.2d 106 (1973); *Whitford v. Daniels*, 263 Ark. 222, 563 S.W.2d 469 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983).

11-10-512. Disqualification — Satisfaction.

(a) “WEEK OF UNEMPLOYMENT” DEFINED. A “week of unemployment” as used in this section and §§ 11-10-514, 11-10-515, 11-10-517, and 11-10-519 means a week during which, except for a disqualification, an individual would be eligible for benefits.

(b) “WEEK OF DISQUALIFICATION” DEFINED.

(1) A “week of disqualification” under §§ 11-10-514(a), 11-10-515, and 11-10-519(2) shall be satisfied by a week of unemployment as defined in this section or by a week of employment during which the employee has earnings in an amount equal to his or her weekly benefit amount.

(2) However, no week may be used in satisfaction of a disqualification under § 11-10-514(a) or § 11-10-515 which is prior to the filing of his or her claim.

History. Acts 1941, No. 391, § 5; 1949, No. 155, § 5; 1953, No. 162, § 3; 1955, No. 395, § 20; 1971, No. 35, § 9; A.S.A. 1947, § 81-1106; Acts 2001, No. 1367, § 5.

CASE NOTES

ANALYSIS

In General.
Construction.

In General.

Sections 11-10-512 — 11-10-519 are mutually exclusive. Little Rock Furn. Mfg. Co. v. Commissioner of Labor, 227 Ark. 288, 298 S.W.2d 56 (1957).

Construction.

It must be remembered in interpreting and applying this section that the basic design of this chapter is to protect the employee from the economic consequences of unemployment through no fault of the employee; and, to that end, this chapter should be liberally construed. Whitlow v. American Greetings Co., 268 Ark. 1122, 599 S.W.2d 410 (Ct. App. 1980).

Cited: Cash v. Rocket Mfg. Co., 223 Ark. 561, 267 S.W.2d 318 (1954); Garrett v. Cline, 257 Ark. 829, 520 S.W.2d 281 (1975); Harris v. Daniels, 263 Ark. 897, 567 S.W.2d 954 (1978); Stagecoach Motel

v. Krause, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980); Jordan v. Dukes, 269 Ark. 581, 600 S.W.2d 21 (Ct. App. 1980); Stewart v. Daniels, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980); Cross v. Daniels, 271 Ark. 201, 607 S.W.2d 680 (1980); Hodnett v. Daniels, 271 Ark. 479, 609 S.W.2d 122 (1980); Ireland v. Daniels, 2 Ark. App. 44, 616 S.W.2d 33 (1981); Jeffreys v. Everett, 6 Ark. App. 265, 640 S.W.2d 465 (1982); Ramsey v. Everett, 7 Ark. App. 120, 644 S.W.2d 621 (1983); Jones v. Director of Labor, 8 Ark. App. 234, 650 S.W.2d 601 (1983); Feagin v. Everett, 9 Ark. App. 59, 652 S.W.2d 839 (1983); Linscott v. Director of Labor, 9 Ark. App. 103, 653 S.W.2d 150 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984); Reynolds Metals Co. v. Couch, 12 Ark. App. 267, 675 S.W.2d 838 (1984); Helena-West Helena Sch. Dist. v. Stiles, 15 Ark. App. 30, 688 S.W.2d 326 (1985); Shipley Baking Co. v. Stiles, 17 Ark. App. 72, 703 S.W.2d 465 (1986); Walker v. Director, Emp. Sec. Dep't., 40 Ark. App. 12, 840 S.W.2d 200 (1992).

11-10-513. Disqualification — Voluntarily leaving work.

(a)(1) If so found by the Director of the Department of Workforce Services, an individual shall be disqualified for benefits if he or she voluntarily and without good cause connected with the work left his or her last work.

(2)(A) An individual working as a temporary employee will be deemed to have voluntarily quit employment and will be disqualified for benefits under this subsection if upon conclusion of his or her latest assignment, the temporary employee without good cause failed to contact the temporary help firm for reassignment, provided that the employer advised the temporary employee at the time of hire that he or she must report for reassignment upon conclusion of each assignment and that unemployment benefits may be denied for failure to do so.

(B)(i) As used in this subsection, "temporary help firm" means a firm that hires its own employees and assigns them to clients to support or supplement the client's work force in work situations such

as employees' absences, temporary skill shortages, seasonal workloads, and special assignments and projects.

(ii) The term does not include employee leasing companies regulated under § 11-10-717(e).

(C) "Temporary employee" means an employee assigned to work for the clients of a temporary help firm.

(3) Any person who leaves his or her last work to comply with the order of a correctional institution or to satisfy the terms of his or her parole or probation shall be deemed to have left work "voluntarily and without good cause connected with the work".

(4) The disqualification shall continue until, subsequent to filing a claim, he or she has had at least thirty (30) days of employment covered by an unemployment compensation law of this state, another state, or the United States.

(b) No individual shall be disqualified under this section if after making reasonable efforts to preserve his or her job rights he or she left his or her last work:

(1) Due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification;

(2)(A) Because of illness, injury, pregnancy, or disability of the individual or a member of the individual's immediate family.

(B) As used in subdivision (b)(2)(A) of this section, "immediate family member" means a spouse, child, parent, brother, sister, grandchild, or grandparent of the individual;

(3)(A) Due to domestic violence that causes the individual reasonably to believe that the individual's continued employment will jeopardize the safety of the individual or a member of the individual's immediate family.

(B) As used in subdivision (b)(3)(A) of this section, "immediate family member" means a spouse, child, parent, brother, sister, grandchild, or grandparent of the individual; or

(4) To accompany the individual's spouse because of a change in the location of the spouse's employment that makes it impractical to commute.

(c)(1) No individual shall be disqualified under this section if he or she left his or her last work because he or she voluntarily participated in a permanent reduction in the employer's work force after the employer announced a pending reduction in its work force and asked for volunteers.

(2) Such actions initiated by the employer shall be considered layoffs regardless of any incentives offered by the employer to induce its employees to volunteer.

(3) Any incentives received shall be reported under § 11-10-517.

History. Acts 1941, No. 391, § 5; 1947, No. 93, § 6; 1967, No. 248, § 1; 1977, No. 398, § 4; 1949, No. 155, § 5; 1953, No. 366, § 6; 1979, No. 492, § 7; 1979, No. 162, § 3; 1955, No. 395, §§ 9, 10; 1963, 922, § 7; 1983, No. 482, § 16; A.S.A. 1947,

§ 81-1106; Acts 1997, No. 234, § 12; 2003, No. 1223, § 5; 2005, No. 902, § 2; 2007, No. 490, § 5; 2009, No. 802, § 4.

RESEARCH REFERENCES

ALR. Unemployment compensation: Harassment or other mistreatment by co-worker as “good cause” justifying abandonment of employment. 121 A.L.R.5th 467.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

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In General.

Sections 11-10-512 — 11-10-519 are mutually exclusive. Little Rock Furn. Mfg. Co. v. Commissioner of Labor, 227 Ark. 288, 298 S.W.2d 56 (1957).

Unemployment benefits are not for those individuals who are voluntarily unemployed or incapable of working due to illness or family responsibilities which preclude them from accepting employment within their capabilities. Wacaster v. Daniels, 270 Ark. 190, 603 S.W.2d 907 (1980).

Where employees’ acceptance of a severance package precluded unemployment benefits, the appellate court held that, because employees acted in reliance of the explicit prior policy of the employer, which allowed for unemployment benefits when their severance pay ran out, it was unfair and inequitable for the employees to be

denied unemployment benefits when the employer later changed that policy and then denied benefits because the employees had not applied for unemployment benefits before the effective date of the policy change. Thompson v. Dir., Empl. Sec. Dep’t, 88 Ark. App. 181, 196 S.W.3d 521 (2004).

Conditioning the availability of unemployment benefits upon a person’s willingness to violate “cardinal principles” of their religious faith effectively penalizes the free exercise of constitutional liberties. Guaranteed Auto Fin., Inc. v. Dir., ESD, 92 Ark. App. 295, 213 S.W.3d 39 (2005).

Construction.

It must be remembered in interpreting and applying this section that the basic design of this chapter is to protect the employee from the economic consequences of unemployment through no fault of the employee; and, to that end, this chapter should be liberally construed. Whitlow v. American Greetings Co., 268 Ark. 1122, 599 S.W.2d 410 (Ct. App. 1980).

Burden of Proof.

A claimant bears the burden of proving good cause by a preponderance of the evidence. Perdrix-Wang v. Director, Emp. Sec. Dep’t, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

Due Process.

Claimant was not denied due process even though the Board of Review denied his claim on the ground that he was disqualified due to misconduct, a different ground than that found by the referee; the board did not exceed the parameters of the defined issues and this case did not present a situation where the board disquali-

fied a claim for benefits on a ground unanticipated by the claimant. *Moore v. Price*, 52 Ark. App. 10, 914 S.W.2d 318 (1996).

Erroneous Payment.

Employee, who voluntarily left employment, was not entitled to unemployment benefits, and amount erroneously paid could not be charged to employer's contribution experience account. *Call v. Luten*, 219 Ark. 640, 244 S.W.2d 130 (1951).

Evidence.

Evidence insufficient to find that claimant voluntarily left work and claimant was therefore entitled to benefits. *Harmon v. Laney*, 239 Ark. 603, 393 S.W.2d 273 (1965); *Deatherage v. Daniels*, 267 Ark. 683, 590 S.W.2d 62 (Ct. App. 1979); *Jackson v. Daniels*, 267 Ark. 685, 590 S.W.2d 63 (Ct. App. 1979); *Woods v. Daniels*, 269 Ark. 613, 599 S.W.2d 435 (Ct. App. 1980); *Dobbins v. Everett*, 2 Ark. App. 254, 620 S.W.2d 309 (1981); *Stuart v. Everett*, 4 Ark. App. 347, 631 S.W.2d 25 (1982).

Evidence sufficient to find that claimant voluntarily left work and claimant was therefore disqualified for benefits. *Middleton v. Arkansas Employment Sec. Div.*, 265 Ark. 11, 576 S.W.2d 218 (1979); *Buckley v. Daniels*, 268 Ark. 763, 597 S.W.2d 98 (Ct. App. 1980); *McKnight v. Daniels*, 268 Ark. 1056, 598 S.W.2d 436 (Ct. App. 1980); *Ogier v. Daniels*, 268 Ark. 1151, 599 S.W.2d 150 (Ct. App. 1980); *Lawson v. Daniels*, 269 Ark. 701, 600 S.W.2d 423 (Ct. App. 1980); *Broyles v. Daniels*, 269 Ark. 712, 600 S.W.2d 426 (Ct. App. 1980); *Graham v. Daniels*, 269 Ark. 717, 601 S.W.2d 225 (Ct. App. 1980); *Smith v. Daniels*, 269 Ark. 817, 601 S.W.2d 235 (Ct. App. 1980); *Gilbert v. Everett*, 7 Ark. App. 260, 647 S.W.2d 486 (1983); *Haig v. Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983); *Hopkins v. Stiles*, 10 Ark. App. 77, 662 S.W.2d 177 (1983), rev'd, 282 Ark. 207, 666 S.W.2d 703 (1984); *Nichols v. Stiles*, 11 Ark. App. 212, 668 S.W.2d 554 (1984); *Cowan v. Director, Ark. Emp. Sec. Dep't*, 56 Ark. App. 17, 936 S.W.2d 766 (1997).

The Board of Review's denial of unemployment benefits pursuant to this section, based upon a finding that the claimant voluntarily left his last work without good cause connected with the work, was supported by substantial evidence, where the record contained three conflicting

statements made by the claimant himself and a fourth version of the facts made by the manager of the grocery store where he was employed. *Haynes v. Director of Labor*, 19 Ark. App. 71, 719 S.W.2d 437 (1986).

Where petitioner worked as a quality control chemist for a plastics manufacturer and, without medical advice, quit to avoid certain chemicals in order to protect the integrity of her breast milk after having a child and voluntarily choosing to breast-feed the child, there was substantial evidence to support the board of review's finding that petitioner voluntarily left work without good cause. *Perdrix-Wang v. Director, Emp. Sec. Dep't*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

Where employee quit his job because the employer's president questioned him about an insurance claim he submitted for substance abuse treatment and employee felt that this was an invasion of his privacy and that he could not continue working under those conditions, the employee left his work voluntarily and without good cause connected with the work. *Brown v. Director, Emp. Sec. Div.*, 54 Ark. App. 205, 924 S.W.2d 492 (1996).

Benefits denied where claimant failed to follow the employer's grievance procedure, and where her emotional reaction to perceived illegal actions by her colleagues or employer did not affect the voluntariness of her leaving and did not give her good cause to quit. *Ahrend v. Director, Emp. Sec. Div.*, 55 Ark. App. 71, 930 S.W.2d 392 (1996).

Denial of benefits improper where the Board of Review's decision did not set forth sufficient findings of fact upon which it relied in reaching its conclusion; the decision presented a conclusory statement, labeled a "finding," the Board did not detail or analyze the facts upon which this "finding" was based, and the Board failed to provide a simple straightforward statement of what happened. *Ferren v. Director, Emp. Sec. Dep't*, 59 Ark. App. 213, 956 S.W.2d 198 (1997).

Arkansas Board of Review's finding that the claimant voluntarily left work without good cause was not supported by substantial evidence; whether there was good cause was irrelevant where the departure was not voluntary, but rather, the job was completed. *Weaver v. Dir., Empl.*

Sec. Dep't, 82 Ark. App. 616, 120 S.W.3d 158 (2003).

Arkansas Board of Review's decision granting unemployment benefits to an employee based on a finding that he left his employment after his employer requested volunteers for a work force reduction was not supported by substantial evidence; the Board never explicitly made a finding as to whether the employer "asked for volunteers" pursuant to the requirements of subsection (c) of this section. *Southwestern Bell Tel., L.P. v. Dir., Empl. Sec. Dep't*, 88 Ark. App. 36, 194 S.W.3d 790 (2004).

Substantial evidence did not support the conclusion by the Arkansas Board of Review that the claimant made reasonable efforts to preserve his job rights, because while the Board suggested that requesting a leave of absence would have been impractical and would have constituted a futile effort to preserve his job rights, there was simply no evidence in the record regarding what the employer's response to such a request might have been. *Woodunique, Inc. v. Dir., Dep't of Workforce Servs.*, 103 Ark. App. 280, 288 S.W.3d 699 (2008).

Substantial evidence supported the award of unemployment benefits, because the employee was discharged, and due to the inclement weather, the Arkansas Board of Review found that the employee had good reason for refusing to report to work and that her refusal under the circumstances did not constitute a willful disregard of the employer's interests; it had been snowing on the day in question, police advised travelers to exercise caution on bridges, and the employee had to travel over at least one bridge to get to work. *Ark. Internal Med. Clinic v. Dir., Dep't of Workforce Servs.*, 2012 Ark. App. 95, — S.W.3d — (2012).

Good Cause.

Evidence sufficient to find that claimant had good cause for refusing job or leaving work. *Ladish Co. v. Breashears*, 263 Ark. 48, 563 S.W.2d 419 (1978); *Jackson v. Daniels*, 269 Ark. 714, 600 S.W.2d 427 (Ct. App. 1980); *Teel v. Daniels*, 270 Ark. 766, 606 S.W.2d 151 (1980); *Bennett v. Daniels*, 1 Ark. App. 19, 611 S.W.2d 801 (1981); *Robinson v. Daniels*, 1 Ark. App. 152, 613 S.W.2d 608 (1981); *Murphy v. Everett*, 5 Ark. App. 281, 635 S.W.2d 301 (1982);

McEwen v. Everett, 6 Ark. App. 32, 637 S.W.2d 617 (1982); *Young v. Everett*, 6 Ark. App. 295, 641 S.W.2d 39 (1982); *Barker v. Stiles*, 9 Ark. App. 273, 658 S.W.2d 416 (1983).

What constitutes good cause is usually a question of fact within the province of the Board of Review. *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978).

Evidence insufficient to find that claimant had good cause for refusing job or leaving work. *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Armstrong v. Daniels*, 270 Ark. 303, 603 S.W.2d 481 (Ct. App. 1980); *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (1980); *Hunter v. Daniels*, 2 Ark. App. 94, 616 S.W.2d 763 (1981); *Wilson v. Director of Labor*, 5 Ark. App. 212, 635 S.W.2d 5 (1982); *Morton v. Director of Labor*, 22 Ark. App. 281, 742 S.W.2d 118 (1987); *Calvin v. Director of Labor*, 31 Ark. App. 74, 787 S.W.2d 701 (1990); *Garrett v. Director, Emp. Sec. Dep't*, 58 Ark. App. 7, 944 S.W.2d 865 (1997).

General economic conditions which lead to a claimant's seeking higher wages or lower living costs do not constitute "good cause connected with the work," as contemplated in this section. *Broyles v. Daniels*, 269 Ark. 712, 600 S.W.2d 426 (Ct. App. 1980).

Although benefits would be denied an employee who left her work for general economic reasons not connected with some specific alleged unfairness perpetrated by her employer, an act by the employer which does economic injury to the employee may be good cause connected with the work. *Jackson v. Daniels*, 269 Ark. 714, 600 S.W.2d 427 (Ct. App. 1980).

There is nothing in the chapter which even remotely suggests that an employee may voluntarily quit her job because of an isolated incident which might arguably be in violation of a section of this chapter and thereby preserve unemployment insurance benefits. *Graham v. Daniels*, 269 Ark. 717, 601 S.W.2d 225 (Ct. App. 1980).

While allegations of substantial decrease in wages may be considered as good cause for voluntary departure from employment, complaints based primarily upon economic conditions beyond the control of the employer do not fit the statutory exemption from disqualification.

Armstrong v. Daniels, 270 Ark. 303, 603 S.W.2d 481 (Ct. App. 1980).

The term "good cause" means a justifiable reason for not accepting the particular job offered and to constitute good cause, the reason for refusal must not be arbitrary or capricious and the reasons must be connected with the work itself; while personal factors may be considered in determining whether there is good cause, they are not controlling or dispositive of the issue. *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (1980); *Rowlett v. Director*, 45 Ark. App. 99, 872 S.W.2d 83 (1994).

The question of what is good cause must be determined in the light of the facts in each case. *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (1980).

Sexual harassment endured by an unemployment benefits claimant does not have to be unbearable before the treatment could be considered good cause for the claimant to voluntarily quit her job. *McEwen v. Everett*, 6 Ark. App. 32, 637 S.W.2d 617 (1982).

Good cause to refuse work which is otherwise suitable, as required to remain eligible for unemployment compensation under this section, does not exist merely because the employee's acceptance of the offered position will result in the discharge of a fellow employee of less seniority. *Reynolds Metals Co. v. Couch*, 8 Ark. App. 37, 648 S.W.2d 497 (1983).

In determining the existence of good cause for voluntarily leaving one's work under this section, factors to be considered include the degree of risk to one's health, safety, and morals, and her physical fitness, prior training, and experience. *Perdrix-Wang v. Director, Emp. Sec. Dep't*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

Good cause is dependent not only on the good faith of the employee involved, which includes the presence of a genuine desire to work and to be self-supporting, but also on the reaction of the average employee. *Perdrix-Wang v. Director, Emp. Sec. Dep't*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

Good cause is a cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment. *Perdrix-Wang v. Director, Emp. Sec. Dep't*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

What constitutes good cause is ordinarily a question of fact for the board of

review to determine from the particular circumstances of each case. *Perdrix-Wang v. Director, Emp. Sec. Dep't*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

It was not unreasonable for the employer to request employee to go to the night shift, nor was it unreasonable to demote employee for refusing to do so. *Khan v. Director, Emp. Sec. Dep't*, 48 Ark. App. 64, 892 S.W.2d 513 (1994).

"Good cause" depends not only on the good faith of the employee involved but also on the reaction of the average employee and includes the element of whether the employee took appropriate steps to rectify the problem. *Clafin v. Price*, 53 Ark. App. 126, 920 S.W.2d 20 (1996).

Claimant lacked good cause for quitting where her supervisor originally informed her that reduction in work hours was something that he wanted to try and that it was his intention to move her back to full-time after a week of half-time work. *Clafin v. Price*, 53 Ark. App. 126, 920 S.W.2d 20 (1996).

Employee's decision not to commute to new place of employment did not constitute failure to accept suitable work where the commute was 50 additional miles, the travel expenses, although partially reimbursed, would result in a net decrease in pay, and where the inherent conditions of the mountainous road presented a safety hazard. *Carpenter v. Director of Ark. Emp. Sec. Dep't*, 55 Ark. App. 39, 929 S.W.2d 177 (1996).

The claimant did not have good cause to leave his work voluntarily where: (1) the day before he resigned, the claimant took off work to go deer hunting and did not call in to inform his supervisor; (2) the next day, he reported to work and was confronted by his supervisor regarding his absence; (3) the supervisor presented him with a written reprimand, and the claimant refused to sign it; (4) the claimant objected to the reprimand and maintained that there was a disparate application of the absenteeism policy; (5) thereafter, the supervisor retrieved the reprimand document and gave the claimant a choice between taking a demotion with a pay cut or resigning; and (6) the claimant chose to resign and seek benefits. *Barber v. Director, Emp. Sec. Dep't*, 67 Ark. App. 20, 992 S.W.2d 159 (1999).

Where the only evidence presented was employee's testimony that he was subjected to verbal and physical abuse on the job, employee quit for good cause and was entitled to unemployment benefits. *Gunter v. Dir., Empl. Sec. Dep't*, 82 Ark. App. 346, 107 S.W.3d 902 (2003).

Former employee was properly denied unemployment benefits where he voluntarily resigned without good cause connected to the employee's work; although the employee claimed that he was asked to violate the provisions of § 25-33-101 et seq., the court did not see how any alleged restrictions imposed on the employee prevented him from performing duties as required by §§ 25-33-104(a)(3), (4), (8) and (13) [repealed]. *Bradford v. Dir., Empl. Sec. Dep't*, 83 Ark. App. 332, 128 S.W.3d 20 (2003).

After reviewing §§ 25-19-102, 25-19-105, 25-19-106, the court found nothing in the Freedom of Information Act that specifies that the communications media by which the public's business is conducted are limited to publicly owned communications; thus, the court rejected a state employee's claim that the employee was asked to violate the law by communicating with the governor via a private email address and, thus, the employee's subsequent resignation was voluntary without good cause and the employee was not entitled to benefits under subdivision (a)(1). *Bradford v. Dir., Empl. Sec. Dep't*, 83 Ark. App. 332, 128 S.W.3d 20 (2003).

Employee was entitled to unemployment benefits where it was determined that he left his job for good cause; the employee had spent five years of complaining to all levels of management about his reassignment and quit after having management violate its own seniority rules and take no action to provide a permanent remedy such that his circumstances would reasonably impel an average worker to give up his or her employment. *Lewis v. Dir., Empl. Sec. Dep't*, 84 Ark. App. 381, 141 S.W.3d 896 (2004).

Arkansas Board of Review properly held that employee was entitled to unemployment benefits under subdivision (a)(1) of this section where the employee had good cause to leave once his constitutionally protected religious beliefs diverged with his job requirement of working on Saturdays as an automobile salesman; the employee could not be de-

nied unemployment compensation solely because he chose his religion over his job. *Guaranteed Auto Fin., Inc. v. Dir., ESD*, 92 Ark. App. 295, 213 S.W.3d 39 (2005).

Court disagreed with the Arkansas Board of Review's conclusion that an employee failed to prove that she left her job for reasons that would have impelled the average able-bodied, qualified worker to give up her employment and that, in the absence of such good cause, she was disqualified from receiving benefits pursuant to subdivision (a)(1) of this section. In the court's view, reasonable minds could not have concluded, on the basis of the facts actually found by the board, that the employee lacked good cause connected with the work for terminating her employment unless she continued to endure abuse, later including abuse for whistle blowing, after she had made two fruitless efforts to rectify her problem with management. *Swain v. Dep't of Workforce Servs.*, 102 Ark. App. 171, 283 S.W.3d 603 (2008).

Employee's claim for unemployment benefits was wrongfully denied under subdivision (a)(1) of this section because the employee voluntarily left work with good cause; the employee was sexually harassed by a coworker, who was relative of the employer. Upon learning of the harassment, the employer did not separate the coworker from the employee completely. *Relyea v. Dir.*, 104 Ark. App. 235, 290 S.W.3d 34 (2008).

Husband and Wife.

Sexual harassment by her supervisor has been held to be good cause for an employee to voluntarily resign her employment; such good cause also extends to the husband of the victim of the sexual harassment where husband and wife have the same employer. *Boothe v. Director, Emp. Sec. Dep't*, 59 Ark. App. 169, 954 S.W.2d 946 (1997).

Labor Disputes.

Where claimants were disqualified under former provision of this section relating to labor disputes they could not also be again disqualified under this section when they offered to return to work. *Little Rock Furn. Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957); *Rainfair, Inc. v. Cobb*, 229 Ark. 37, 312 S.W.2d 906 (1958) (decision prior to 1955 amendment).

Leaves of Absence.

Inasmuch as this chapter contains no definition of leave of absence, the court would consider language of the contract between the parties, prior conduct and dealings by the employer with employees, and any other relevant facts at hand in determining if a leave of absence existed. *Southwestern Bell Tel. Co. v. Thornbrough*, 232 Ark. 929, 341 S.W.2d 1 (1960).

Where the leave of absence had not been terminated, it was error for the commissioner to declare claimant eligible for benefits. *Southwestern Bell Tel. Co. v. Thornbrough*, 232 Ark. 929, 341 S.W.2d 1 (1960).

A woman who has a leave of absence for pregnancy does not have to secure thirty days of new work if she is not rehired, in order to receive benefits. *Southwestern Bell Tel. Co. v. Thornbrough*, 232 Ark. 929, 341 S.W.2d 1 (1960).

Where contract of employment provided for leaves of absence for good cause and for reasonable periods and employee was granted leave of absence of one year for pregnancy although document stated that there probably would be no place for employee when she returned, but record reflected that employees granted the leave were nearly always hired back without loss of seniority benefits, the employee was granted a leave of absence within the meaning of this chapter. *Southwestern Bell Tel. Co. v. Thornbrough*, 232 Ark. 929, 341 S.W.2d 1 (1960).

Where employee was granted year's pregnancy leave but applied for reinstatement and was refused prior to expiration of the year, commissioner erred in declaring employee eligible for unemployment benefits since leave of absence had not expired and one year leave of absence was not an unreasonable time. *Southwestern Bell Tel. Co. v. Thornbrough*, 232 Ark. 929, 341 S.W.2d 1 (1960).

The evidence upon which claimant's disqualification for benefits was based was not substantial where the claimant sought a 30 days leave of absence prior to leaving work for family emergency, but was refused. *Morse v. Daniels*, 271 Ark. 402, 609 S.W.2d 80 (1980).

Misapplication by Board of Review.

Award of unemployment benefits under § 11-10-514(a) to an employee by the Arkansas Board of Review had to be re-

versed because the Board misapplied the law when it, in effect, ignored subdivision (a)(1) of this section to determine whether the employee should be disqualified for benefits if she voluntarily and without good cause left her last work. *A Team Temps. v. Dir., Dep't of Workforce Servs.*, 104 Ark. App. 71, 289 S.W.3d 158 (2008).

Part-time Employment.

A claimant who voluntarily leaves part-time employment is ineligible for further unemployment benefits only to the extent that his benefits would have been decreased by his part-time wages. *Hopkins v. Stiles*, 10 Ark. App. 77, 662 S.W.2d 177 (1983), rev'd, 282 Ark. 207, 666 S.W.2d 703 (1984).

Where it appeared from the record that had claimant continued her part-time employment, her part-time wages were too small to have any effect on unemployment benefits which she was already receiving, claimant was entitled to unemployment benefits even though she voluntarily left part-time job without good cause. *Hopkins v. Stiles*, 10 Ark. App. 77, 662 S.W.2d 177 (1983), rev'd, 282 Ark. 207, 666 S.W.2d 703 (1984).

An employee who was laid off from a full-time job after ten years, subsequently obtained a part-time job with an employment agency, and later quit the part-time job was entitled to unemployment benefits based upon the full-time job subject only to partial reduction by the amount of her part-time wages. *Stiles v. Coit*, 285 Ark. 212, 686 S.W.2d 405 (Ark. 1985).

Personal Emergency.

Evidence sufficient to find existence of personal emergency. *Wade v. Thornbrough*, 231 Ark. 454, 330 S.W.2d 100 (1959); *Turner v. Daniels*, 270 Ark. 418, 605 S.W.2d 465 (1980); *Valentine v. Barnes*, 1 Ark. App. 308, 615 S.W.2d 386 (1981); *Timms v. Everett*, 6 Ark. App. 163, 639 S.W.2d 368 (1982).

This section does not require an individual to offer medical proof of a personal emergency to his employer; it requires the individual to make reasonable efforts to preserve his job rights. An individual may preserve his job rights by requesting a leave of absence from his employer. *Timms v. Everett*, 6 Ark. App. 163, 639 S.W.2d 368 (1982).

Threats of physical abuse and ejection from one's home, sufficient to cause claim-

ant to seek shelter with others, clearly constitute a personal emergency. *Rivers v. Stiles*, 16 Ark. App. 121, 697 S.W.2d 938 (1985).

Preservation of Job Rights.

Evidence insufficient to find that claimant made sufficient efforts to preserve job rights. *Daves v. Sears Roebuck & Co.*, 255 Ark. 723, 502 S.W.2d 106 (1973); *Gordos Ark., Inc. v. Stiles*, 16 Ark. App. 30, 696 S.W.2d 320 (1985); *Western Sizzlin of Russellville, Inc. v. Director of Labor*, 30 Ark. App. 141, 783 S.W.2d 875 (1990).

Where claimant becomes unemployed, he is not required to request alternative work when he had already been told that there were no more openings. *Graham v. Daniels*, 269 Ark. 774, 601 S.W.2d 229 (Ct. App. 1980).

Evidence sufficient to find that claimant made sufficient efforts to preserve job rights. *Graham v. Daniels*, 269 Ark. 774, 601 S.W.2d 229 (Ct. App. 1980); *Turner v. Daniels*, 270 Ark. 418, 605 S.W.2d 465 (1980); *Butler v. Director of Labor*, 3 Ark. App. 229, 624 S.W.2d 448 (1981).

Claimant's failure to seek a leave of absence from her employer because he did not grant leaves did not disqualify her under this section as not having made reasonable efforts to preserve her job rights, since asking for a leave of absence after her employer had released her would be a useless act and since a claimant who is terminated by her employer through no fault of her own is not bound to preserve her job rights as is required when she voluntarily quits her employment. *Ireland v. Daniels*, 2 Ark. App. 44, 616 S.W.2d 33 (1981).

This section requires the individual to make reasonable efforts to preserve his job rights. An individual may preserve his job rights by requesting a leave of absence from his employer. *Timms v. Everett*, 6 Ark. App. 163, 639 S.W.2d 368 (1982).

Where employee was informed by personnel manager that leave had to be granted by her supervisor and employee tried that avenue but was denied, was never informed of Family Medical Leave and was not given a personnel handbook, employee made reasonable efforts to preserve her job rights and was entitled to unemployment benefits. *Williams v. Dir., Empl. Sec. Dep't*, 81 Ark. App. 147, 98 S.W.3d 856 (2003).

Temporary Employment.

Once a claimant is disqualified for leaving a permanent job he cannot wipe out disqualification by taking a temporary job for a week knowing the job is temporary. *Hope Brick Works v. Call*, 221 Ark. 928, 256 S.W.2d 729 (1953).

While it is understandable and logical why an employee who quits a permanent job in order to accept a temporary one is dissatisfied to benefits when the temporary employment ceases, the same disqualifying rule would not be applicable when an employee leaves a temporary assignment to accept another temporary position which affords more pay. *Kilgore v. Falls Church Animal Hosp.*, 267 Ark. 801, 590 S.W.2d 671 (1979).

Time to Disqualify.

Once commissioner has determined that claimant has left his job he must impose the disqualification. *Hope Brick Works v. Call*, 221 Ark. 928, 256 S.W.2d 729 (1953).

Voluntary Leaving Not Shown.

Plaintiff did not voluntarily leave his position as president of a business without good cause connected with his work, notwithstanding that he agreed to resign, signed a covenant not to compete, and was paid \$60,000, where he had worked for the business for 28 years, the business was in the process of being sold at the time of his resignation, and he was being replaced as president and was not hired by the new owners except as a consultant. *Hiner v. Director, Ark. Emp. Sec. Dep't*, 61 Ark. App. 139, 965 S.W.2d 785 (1998).

Pizza cook did not voluntarily quit his employment without good cause connected to the work where both he and the employer's representative testified that the outside temperature was at least 100 degrees on the day he quit, the air conditioning in the kitchen was not working, the door to the kitchen was closed on orders of the employer, the employer was aware of the problem with the air conditioning, and the cook had complained about the problem several times. *Brooks v. Director, Ark. Emp. Sec. Dep't*, 62 Ark. App. 85, 966 S.W.2d 941 (1998).

Arkansas Board of Review's finding, denying an inmate unemployment benefits because he voluntarily left his last work, pursuant to this section, was not sup-

ported by substantial evidence where the inmate was transferred out of the work release program by the correction department and had no choice in the matter. *Rankin v. Dir., Empl. Sec. Dep't*, 78 Ark. App. 174, 79 S.W.3d 885 (2002).

Evidence established that the employee was discharged when the main plant manager suddenly decided to discontinue the employer's past practice of providing a substitute worker during hours that the employee, who was reliant on public transportation, could not be present for overtime work on the weekend; thus, the employee did not leave the employee's work voluntarily and without good cause connected with the work, and the board of review's decision to the contrary was reversed. *Missouri v. Dir., Empl. Sec. Dep't*, 84 Ark. App. 172, 137 S.W.3d 436 (2003).

Where an owner of a company used an expletive when calling a former employee a liar after she denied methamphetamine use, it was determined that the employee voluntarily quit with good cause when she left the premises a few minutes later; thus, substantial evidence supported a finding that she was entitled to unemployment benefits. *Pocahontas Elecs. v. Dir., Dep't of Workforce Servs.*, 96 Ark. App. 227, 240 S.W.3d 130 (2006).

Voluntary Leaving Shown.

Cashier who quit as a result of harassment by temporary manager trainee was not entitled to receive unemployment benefits. *Owens v. Director, Ark. Emp. Sec. Dep't*, 55 Ark. App. 255, 935 S.W.2d 285 (1996).

Employee on suspension who quit when faced with probable, but not absolutely certain, discharge, voluntarily left employment without good cause. *Anderson v. Director, Emp. Sec. Dep't*, 59 Ark. App. 266, 957 S.W.2d 712 (1997).

Employee left his last work without making reasonable efforts to preserve his job rights, where after returning from a medical leave of absence, he was unable to resume his normal duties and resigned before there was opportunity to remedy the situation. *Wenzl v. Director*, 60 Ark. App. 21, 959 S.W.2d 63 (1997).

Where employees had voluntarily applied for a voluntary severance package (VSP), the board of review did not err in finding that the employees had voluntarily left their work without good cause connected with the work and were not entitled to unemployment benefits; the employee's jobs were clearly suitable for them because the work would have been a continuation of the jobs they were already performing and they were not in imminent danger of losing their jobs. *Billings v. Dir., Empl. Sec. Dep't*, 84 Ark. App. 79, 133 S.W.3d 399 (2003).

Withdrawal of Resignation.

An employee who voluntarily resigns his employment without good cause connected with the work is not entitled to unemployment benefits even if he attempted to withdraw his resignation prior to his last day of employment with that employer. *Osterhout v. Everett*, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982).

Cited: *Cash v. Rocket Mfg. Co.*, 223 Ark. 561, 267 S.W.2d 318 (1954); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980); *Jordan v. Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ct. App. 1980); *Stewart v. Daniels*, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980); *Cross v. Daniels*, 271 Ark. 201, 607 S.W.2d 680 (1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Ireland v. Daniels*, 2 Ark. App. 44, 616 S.W.2d 33 (1981); *Jeffreys v. Everett*, 6 Ark. App. 265, 640 S.W.2d 465 (1982); *Ramsey v. Everett*, 7 Ark. App. 120, 644 S.W.2d 621 (1983); *Jones v. Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Stiles v. Hopkins*, 282 Ark. 207, 666 S.W.2d 703 (1984); *Reynolds Metals Co. v. Couch*, 12 Ark. App. 267, 675 S.W.2d 838 (1984); *Helena-West Helena Sch. Dist. v. Stiles*, 15 Ark. App. 30, 688 S.W.2d 326 (1985); *Shipley Baking Co. v. Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986); *Rankin v. Dir., Empl. Sec. Dep't*, 82 Ark. App. 575, 120 S.W.3d 169 (2003).

11-10-514. Disqualification — Discharge for misconduct.

(a)(1) If so found by the Director of the Department of Workforce Services, an individual shall be disqualified for benefits if he or she is discharged from his or her last work for misconduct in connection with the work.

(2)(A) In all cases of discharge for absenteeism, the individual will be disqualified if the discharge was pursuant to the terms of a bona fide written attendance policy with progressive warnings, regardless of whether the policy is a fault or no-fault policy.

(B) The disqualification under subdivision (a)(2)(A) of this section shall continue until, subsequent to filing a claim, the individual has had at least thirty (30) days of employment covered by an unemployment compensation law of this state, another state, or the United States.

(3)(A) Except as otherwise provided in this section, an individual's disqualification for misconduct shall be for eight (8) weeks of unemployment as defined in § 11-10-512.

(B) However, for a discharge that occurs on or after July 1, 2009, through June 30, 2013, the disqualification under subdivision (a)(3)(A) of this section shall continue until, subsequent to filing a claim, he or she has had at least thirty (30) days of employment covered by an unemployment compensation law of this state, another state, or the United States.

(C) Misconduct includes violation of any behavioral policies of the employer as distinguished from deficiencies in meeting production standards or accomplishing job duties.

(b)(1) If he or she is discharged from his or her last work for misconduct in connection with the work on account of dishonesty, drinking on the job, reporting for work while under the influence of intoxicants, including a controlled substance, or willful violation of bona fide rules or customs of the employer pertaining to his or her safety or the safety of fellow employees, persons, or company property, he or she shall be disqualified until, subsequent to the date of the disqualification, the claimant has been paid wages in two (2) quarters for insured work totaling not less than thirty-five (35) times his or her weekly benefit amount.

(2)(A) If an individual is discharged for testing positive for an illegal drug pursuant to a United States Department of Transportation-qualified drug screen conducted in accordance with the employer's bona fide written drug policy, the individual is disqualified:

(i) Until, subsequent to the date of the disqualification, the claimant has been paid wages in two (2) quarters for insured work totaling not less than thirty-five (35) times his or her weekly benefit amount; and

(ii) Until he or she passes a United States Department of Transportation-qualified drug screen by testing negative for illegal drugs.

(B) If an individual is disqualified under subdivision (b)(2)(A) of this section, no benefit paid to the individual with respect to any week

of unemployment after the discharge shall be charged to the account of the employer that discharged the individual if the benefit is based upon wages paid to the individual for employment before the discharge by the employer that discharged the individual.

(c)(1) If so found by the director, an individual shall be disqualified for benefits if he or she is suspended from his or her last work for misconduct in connection with the work.

(2) Except as otherwise provided, the disqualification shall be for the duration of the suspension or eight (8) weeks, whichever is the lesser.

(d)(1) An individual shall not be deemed guilty of misconduct for poor performance in his or her job duties unless the employer can prove that the poor performance was intentional.

(2) An individual's repeated act of commission or omission or negligence despite progressive discipline shall constitute sufficient proof of intentional poor performance.

(3) An individual who refuses an alternate suitable job rather than being terminated for poor performance shall be disqualified until, subsequent to filing a claim, he or she has had at least thirty (30) days of employment covered by an unemployment compensation law of this state, another state, or the United States.

History. Acts 1941, No. 391, § 5; 1943, No. 138, § 30; 1947, No. 398, § 4; 1949, No. 155, § 5; 1953, No. 162, § 3; 1955, No. 395, §§ 11, 12; 1971, No. 35, § 9; 1983, No. 482, § 17; A.S.A. 1947, § 81-1106; Acts 1987, No. 753, § 14; 1989 (3rd Ex. Sess.), No. 95, § 1; 1993, No. 6, § 7; 1999, No. 1116, § 11; 2001, No. 770, § 1; 2007, No. 454, § 1; 2009, No. 802, § 5; 2011, No. 861, § 4; 2011, No. 1040, § 2.

A.C.R.C. Notes. Pursuant to § 1-2-207, subdivisions (a)(3)(A) and (B) of § 11-10-514 are set out above as amended by Acts 2011, No. 1040, § 2. The subdivision that is set out above as (a)(3)(C) was created by amendments made to § 11-10-514(a)(3) by Acts 2011, No. 861, § 4, and was designated there as (a)(3)(B). Acts 2011, No. 861, § 4 amended § 11-10-514(a)(3) to read as follows:

“(3)(A) An individual's disqualification for misconduct shall continue until, subsequent to filing a claim, he or she has had at least thirty (30) days of employment covered by an unemployment compensation law of this state, another state, or the United States.

“(B) Misconduct includes violation of any behavioral policies of the employer as distinguished from deficiencies in meeting production standards or accomplishing job duties.”

Amendments. The 2011 amendment by No. 861 rewrote (a)(2), (a)(3), (b)(1), and (b)(2)(A); and added (d).

The 2011 amendment by No. 1040 substituted “on or after July 1, 2009, through June 30, 2012” for “during the period of July 1, 2009, through June 30, 2011” in (a)(3)(B).

RESEARCH REFERENCES

ALR. Work-related inefficiency, incompetence, or negligence as “misconduct” barring unemployment compensation. 95 A.L.R.5th 329.

Use of employer's e-mail or Internet system as misconduct precluding unemployment compensation. 106 A.L.R.5th 297.

Ark. L. Notes. Kirkpatrick, “Jar Wars”: An Examination of the Legality of Drug Testing in the Employment Decision, etc., 1987 Ark. L. Notes 25.

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General Assembly, Labor Law, 24 U. Ark. Little Rock L. Rev. 493.

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In General.

Sections 11-10-512 — 11-10-519 are mutually exclusive. *Little Rock Furn. Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957).

Where it was undisputed that only non-railroad wages from claimant's base period were used to determine the basis for his claim, jurisdiction was properly exercised by the Arkansas Board of Review; because there was insufficient evidence to show that claimant's actions either caused, or were the most likely cause of, the alteration of the urine sample, claimant was discharged from work for reasons which did not constitute misconduct and was, thus, eligible for unemployment compensation. *Ark. Midland R.R. v. Dir., Empl. Sec. Dep't*, 87 Ark. App. 311, 191 S.W.3d 544 (2004).

Construction.

It must be remembered in interpreting and applying this section that the basic

design of this chapter is to protect the employee from the economic consequences of unemployment through no fault of the employee; and, to that end, this chapter should be liberally construed. *Whitlow v. American Greetings Co.*, 268 Ark. 1122, 599 S.W.2d 410 (Ct. App. 1980).

In keeping with the declaration of the state public policy of providing benefits to workers who are unemployed through no fault of their own, the statutory misconduct provision of the law must be given an interpretation in keeping with that declared policy and it should not be so literally construed as to affect a forfeiture of benefits by an employee except in clear instances of misconduct. *Willis Johnson Co. v. Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ct. App. 1980); *St. Vincent Infirmary v. Arkansas Employment Sec. Div.*, 271 Ark. 654, 609 S.W.2d 675 (1980).

While various definitions of the term have been given by Arkansas courts, it appears generally accepted that a finding of "misconduct" will attach only to conduct evincing an intentional or deliberate violation of employer rules, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design. *Hillman v. Arkansas Hwy. & Transp. Dep't*, 39 F.3d 197 (8th Cir. 1994).

While there may be some overlap in the definitions of the respective terms, a greater element of subjective culpability appears to be required for a finding of "misconduct" than that needed to find "just cause" under the Veterans' Reemployment Rights Act, 38 U.S.C. § 4301 et seq.; while misconduct would always constitute just cause, the converse is not necessarily true. *Hillman v. Arkansas Hwy. & Transp. Dep't*, 39 F.3d 197 (8th Cir. 1994).

After employee received unemployment benefits based on a finding of no work-related misconduct, collateral estoppel did not bar the employer from asserting, in a racial discrimination case, that the employee was fired for inappropriate behavior; an administrative finding that the employee was discharged for reasons that did not disqualify him for unemployment benefits under subdivision (a)(1) of this section did not address the issue of

whether an improper racial motive was present within the meaning of § 16-123-107(a)(1) and, absent evidence of racial animus, summary judgment for the employer was proper. *Crockett v. Counseling Servs. of E. Ark., Inc.*, 85 Ark. App. 371, 154 S.W.3d 278 (2004).

Constitutional Rights.

Where claimant for unemployment benefits used profanity in argument in front of supervisor and within the hearing of fellow employees, denial of benefits due to misconduct under this section was not an undue burden on claimant's rights of free speech and expression under the First Amendment to the United States Constitution, since the discharge resulted from a personal, private dispute rather than one emanating from a public issue or criticism of a governmental matter or function. *Reynolds v. Daniels*, 1 Ark. App. 262, 614 S.W.2d 525 (1981).

Due Process.

Claimant was not denied due process even though the Board of Review denied his claim on the ground that he was disqualified due to misconduct, a different ground than that found by the referee; the board did not exceed the parameters of the defined issues and this case did not present a situation where the board disqualified a claim for benefits on a ground unanticipated by the claimant. *Moore v. Price*, 52 Ark. App. 10, 914 S.W.2d 318 (1996).

Misapplication by Board of Review.

Award of unemployment benefits under subsection (a) of this section to an employee by the Arkansas Board of Review had to be reversed because the Board misapplied the law when it, in effect, ignored § 11-10-513(a)(1) to determine whether the employee should be disqualified for benefits if she voluntarily and without good cause left her last work. *A Team Temps. v. Dir., Dep't of Workforce Servs.*, 104 Ark. App. 71, 289 S.W.3d 158 (2008).

Misconduct.

Misconduct which precludes benefits under this chapter contemplates willful or wanton disregard of an employer's interest as is manifested in the deliberate violation or disregard of those standards of behavior which the employer has a

right to expect from his employees. *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980); *Hodges v. Producers Rice Mill*, 270 Ark. 188, 603 S.W.2d 479 (1980); *Exson v. Everett*, 9 Ark. App. 177, 656 S.W.2d 711 (1983); *W.C. Lee Constr. v. Stiles*, 13 Ark. App. 303, 683 S.W.2d 616 (1985); *Shipley Baking Co. v. Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986); *Sadler v. Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987).

Denial of unemployment benefits to the employee was appropriate pursuant to subdivision (a)(1) of this section because she admitted that she had been warned previously about paying the accounts payable in a timely manner and that she was eventually suspended for failing to do so before she was terminated. *Hayden v. Dir., Dep't of Workforce Servs.*, 2010 Ark. App. 298, — S.W.3d — (2010).

Substantial evidence supported the decision denying unemployment benefits under subdivision (a)(1) of this section, because the supervisor testified that the employee, without offering any explanation, flatly refused to comply with the request to adhere to company policy and take the required safety training, thus manifesting wrongful intent. *Ochuzzo v. Dir., Dep't of Workforce Servs.*, 2012 Ark. App. 117, — S.W.3d — (2012).

Unemployment compensation was denied to a claimant because he was terminated for misconduct under subdivision (a)(1) of this section based on his repeated failure to maintain his job performance and follow guidelines for procedures on the job. *Rouse v. Dir. of the Ark. Dep't of Workforce Servs.*, 2012 Ark. App. 186, — S.W.3d — (2012).

—In General.

Mere inefficiency, unsatisfactory conduct, failure of good performance as the result of inability or incapacity, inadvertencies, ordinary negligence or good faith errors in judgment or discretion are not considered misconduct for unemployment insurance purposes unless it is of such degree or recurrence as to manifest culpability, wrongful intent, evil design, or an intentional or substantial disregard of an employer's interests or of an employee's duties and obligations. *Willis Johnson Co. v. Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ct. App. 1980); *Arlington Hotel v. Employment Sec. Div.*, 3 Ark. App. 281, 625

S.W.2d 551 (1981); Shipley Baking Co. v. Stiles, 17 Ark. App. 72, 703 S.W.2d 465 (1986); Little Rock Wastewater Util. v. Stiles, 20 Ark. App. 108, 724 S.W.2d 199 (1987); Rogers v. Director of Labor, 27 Ark. App. 128, 767 S.W.2d 319 (1989); Perry v. Gaddy, 48 Ark. App. 128, 891 S.W.2d 73 (1995).

The legislature did not intend to limit misconduct connected with the employee's work to misconduct which occurred only during the hours of employment and on the employer's premises. If it had, the language used in subsection (a) would have undoubtedly expressed that intent. Feagin v. Everett, 9 Ark. App. 59, 652 S.W.2d 839 (1983).

Where, for unemployment compensation purposes, the claimant was discharged for misconduct rather than being laid off, the disqualification would stand unless the claimant satisfied it by meeting the employment requirement of § 11-10-543(h), and where the claimant did not claim that he actually worked since his discharge, nor that his award of back wages satisfied the employment requirement of § 11-10-543(h), denial of unemployment benefits was proper. Dozier v. Everett, 9 Ark. App. 247, 657 S.W.2d 567 (1983).

Determination by a grievance officer that the claimant was not discharged for misconduct was not determinative of whether, for unemployment compensation purposes, he was discharged for misconduct where there was a final order, not appealed from, holding that he was discharged for misconduct. Dozier v. Everett, 9 Ark. App. 247, 657 S.W.2d 567 (1983).

"Misconduct" involves (1) disregard of the employer's interests, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer. Edwards v. Stiles, 23 Ark. App. 96, 743 S.W.2d 12 (1988); Rucker v. Price, 52 Ark. App. 126, 915 S.W.2d 315 (1996).

There is an element of intent associated with a determination of misconduct, and mere inefficiency or poor performance does not, in itself, constitute misconduct. The Board must determine that there was an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recur-

rence as to manifest wrongful intent or evil design in order to find misconduct. A. Tenenbaum Co. v. Director of Labor, 32 Ark. App. 43, 796 S.W.2d 348 (1990); Rucker v. Price, 52 Ark. App. 126, 915 S.W.2d 315 (1996).

Misconduct for the purposes of unemployment compensation involves: (1) disregard of the employer's interest, (2) violation of the employer's rules, (3) disregard of the standards of behavior which the employer has a right to expect of his employees, and (4) disregard of the employee's duties and obligations to his employer. Greenberg v. Director, Emp. Sec. Dep't, 53 Ark. App. 295, 922 S.W.2d 5 (1996).

To constitute misconduct, there must be more than mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies, ordinary negligence in isolated instances, or good faith error in judgment or discretion; there must be an intentional or deliberate violation, a willful or wanton disregard, or carelessness or negligence of such degree or recurrence as to manifest wrongful intent or evil design. Carraro v. Director, Emp. Sec. Div., 54 Ark. App. 210, 924 S.W.2d 819 (1996).

Employee was disqualified for unemployment benefits where she was discharged for misconduct in connection with her work; the employee's failure to follow the protocol of the nursing home was a dereliction of duty that was wanton and willful and her inaction amounted to a violation of the employer's rules, a disregard of the employer's interest, a disregard of the standards of behavior the employer had a right to expect, as well as a disregard of the employee's duties and obligations to her employer. Johnson v. Dir., Empl. Sec. Dep't, 84 Ark. App. 349, 141 S.W.3d 1 (2004).

Misconduct discovered after an employee is discharged is irrelevant to the question of whether the employee is eligible for benefits. Bd. of Trs. of the Univ. of Ark. v. Williams, 91 Ark. App. 38, 207 S.W.3d 569 (2005).

Employee was improperly disqualified from receiving unemployment benefits under subdivision (a)(1) of this section based on intentional misconduct because employee was not given a clear directive from her employer regarding discussing the fact that she had been suspended

pending an internal investigation. *Pacheco v. Dir., Empl. Sec. Dep't*, 92 Ark. App. 122, 211 S.W.3d 569 (2005).

Where employee was discharged from his position at a residential facility for the psychiatric care of children because a central registry showed a report of child maltreatment, but the listing demonstrated no wrongful intent or evil design such as would constitute misconduct, the Arkansas Board of Review erred by denying unemployment security benefits. *West v. Dir., Empl. Sec. Dep't*, 94 Ark. App. 381, 231 S.W.3d 96 (2006).

—Absenteeism.

A single incident of missing work has ordinarily been considered misconduct within the meaning of this chapter when the failure to report and appear for work involves a disregard of standards of behavior which the employer has a right to expect. *Parker v. Ramada Inn*, 264 Ark. 472, 572 S.W.2d 409 (1978).

Absence sufficient to warrant discharge for misconduct. *Coker v. Daniels*, 267 Ark. 1000, 593 S.W.2d 59 (Ct. App. 1980); *St. Vincent Infirmary v. Arkansas Employment Sec. Div.*, 271 Ark. 654, 609 S.W.2d 675 (1980); *Victor Indus. Corp. v. Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981).

Absence insufficient to warrant discharge for misconduct. *Hodges v. Producers Rice Mill*, 270 Ark. 188, 603 S.W.2d 479 (1980); *Dillaha Fruit Co. v. Everett*, 9 Ark. App. 51, 652 S.W.2d 643 (1983).

Substantial evidence supported a determination that the claimant was disqualified from receiving unemployment insurance benefits because of her misconduct in connection with her work where the claimant was discharged for excessive absenteeism and, although the claimant contended that many of her absences were due to work related carpal tunnel syndrome, she produced only one note from her doctor that plainly excused her from work. *Love v. Director of Ark. Employ. Sec. Dep't*, 71 Ark. App. 396, 30 S.W.3d 750 (2000).

Arkansas Board of Review erred in denying an employee's claim for unemployment compensation benefits; employee's absenteeism did not constitute misconduct sufficient to disqualify her from benefits pursuant to subdivision (a)(1) of this section as the absences were mostly due to sickness and were therefore beyond the

employee's control. *Oliver v. Dir., Empl. Sec. Dep't*, 80 Ark. App. 275, 94 S.W.3d 362 (2002).

—Assault.

Nurse-claimant's conduct in pinching a combative and assaultive patient in order to cause the patient to let go of another nurse was not misconduct. *Thomas v. Director, Emp. Sec. Dep't*, 55 Ark. App. 101, 931 S.W.2d 146 (1996).

—Criminal Charges.

The disposition of criminal charges is a factor which the board may consider in determining whether a worker's actions constituted misconduct in connection with the work, but it does not decide the issue. *Lakeside School v. Harrington*, 8 Ark. App. 205, 649 S.W.2d 847 (1983); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983).

Evidence of criminal charges sufficient to constitute misconduct. *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983).

The Board of Review could reasonably find that the employee was discharged merely because he had been issued a citation for Driving While Intoxicated (DWI), without regard to the truth or falsity of the charge against him, and for reasons other than misconduct connected with his work. *A. Tenenbaum Co. v. Director of Labor*, 32 Ark. App. 43, 796 S.W.2d 348 (1990).

While it is true that an off-duty arrest of an employee may constitute misconduct, the issue of misconduct is a question of fact for the Board of Review. *A. Tenenbaum Co. v. Director of Labor*, 32 Ark. App. 43, 796 S.W.2d 348 (1990).

A claimant was properly discharged for misconduct and, therefore, was not eligible for benefits where he was discharged after pleading no contest to his second charge of domestic battering, a Class D felony; there was a nexus between the claimant's conduct and his work because of the violent nature of the conduct which led to the felony charge. *Baldor Elec. Co. v. Employment Sec. Dep't*, 71 Ark. App. 166, 27 S.W.3d 771 (2000).

—Dishonesty.

The evidence did not support the employer's contention that he fired the claimant because of dishonesty. *Olson v. Everett*, 8 Ark. App. 230, 650 S.W.2d 247 (1983).

Evidence was sufficient to support finding employee was discharged for misconduct connected with her work on account of dishonesty, where there was substantial evidence her actions surpassed mere misreading of gauges to those of not reading gauges and logging false numbers. *Clark v. Director, Emp. Sec. Dep't*, 58 Ark. App. 1, 944 S.W.2d 862 (1997).

Where the claimant was arrested by the police, charged with theft of property and filing a false police report, and her manager testified that he was told by a police officer that claimant admitted that she had taken the money, the evidence was sufficient to establish that claimant was discharged from her last work for misconduct on account of dishonesty and, thus, was ineligible for unemployment benefits. *Williams v. Director*, 79 Ark. App. 407, 88 S.W.3d 427 (2002).

Determination by the Arkansas Board of Review that a worker was disqualified from receiving unemployment compensation benefits because he had been discharged for dishonesty was not supported by substantial evidence where the worker had not revealed his conviction for conspiracy to deliver cocaine in the good-faith but mistaken belief that the record of his conviction and sentence under the Youthful Offender Alternative Service Act of 1975 had been automatically expunged upon the worker's successful completion of his sentence. *King v. Dir., Empl. Sec. Dep't*, 80 Ark. App. 57, 92 S.W.3d 685 (2002).

Where the claimant was restricted to light duty work, the claimant was discharged not for misconduct in performing work outside his medical restriction, but for dishonesty in falsifying a work order, by performing work that included heavy lifting, and using another employee's number in signing off on work that the claimant performed. *Snyder v. Dir., Empl. Sec. Dep't*, 81 Ark. App. 262, 101 S.W.3d 270 (2003).

Arkansas Board of Review's decision, which denied a claim for unemployment benefits pursuant to its finding that claimant was discharged for misconduct, was supported by substantial evidence where (1) claimant's termination and the Board's denial of benefits were not based on a misrepresentation in the bank's record book or failure to follow proper procedures, but rather on claimant's untruth-

fulness during an investigation, (2) claimant represented to a bank investigator that two employees participated in opening the depository when in fact the claimant acted alone in contravention of the bank's policy, (3) there was no doubt that this representation was not truthful, regardless of claimant's testimony that failure to follow proper procedure in this manner was commonplace, and (4) while claimant characterized the conduct as a mere lack of judgment, reasonable minds could have concluded that it rose to the level of dishonesty and an intentional disregard of claimant's obligations as well as the employer's interest. *Lewis v. Dir., Empl. Sec. Dep't*, 90 Ark. App. 219, 205 S.W.3d 161 (2005).

Where an employee of a state university was notified in a letter that her position would be terminated due to low enrollment numbers, she could not be denied unemployment benefits on the basis of misconduct for falsifying enrollment records after receiving the letter as the misconduct was not the basis for discharge. *Bd. of Trs. of the Univ. of Ark. v. Williams*, 91 Ark. App. 38, 207 S.W.3d 569 (2005).

—Drug Testing.

Where employee signed a form agreeing to drug testing policy and testified he had read the policy, and understood it, but subsequently refused to take the test and was discharged for misconduct, there was not substantial evidence to support conclusion that agreement was obtained under duress, and benefits should have been denied. *Riceland Foods, Inc. v. Director of Labor*, 38 Ark. App. 269, 832 S.W.2d 295 (1992).

Reasonableness of drug policy is a prerequisite to finding misconduct for violation of an employer's rule. *George's Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995).

Board's decision of disqualification was upheld where employee was terminated pursuant to the employer's policy requiring the discharge of any employee who tested positively for drugs in excess of the designated tolerance levels. *Rucker v. Price*, 52 Ark. App. 126, 915 S.W.2d 315 (1996).

Where the employer notified the employee that a positive result was obtained on her drug test, and employee neither

obtained a retest within 30 days nor accepted treatment pursuant to the employer's policy, and failure to accept treatment was expressly provided in employer's drug policy to be insubordination subjecting the employee to discharge, discharged employee was properly denied unemployment benefits. *White v. Director*, Ark. Emp. Sec. Dep't, 54 Ark. App. 197, 924 S.W.2d 823 (1996).

Although the employer stated that employee was discharged for failure to follow the recommendations of the employee assistance program, no misconduct was shown where employee, after being asked by the counselor to take a drug test, sought advice from his union; while employee's reliance on the union's advice to go home rather than take the test may have been ill-advised, this conduct was not sufficient for reasonable minds to conclude that employee's conduct rose to the level of "misconduct." *Carraro v. Director*, Emp. Sec. Div., 54 Ark. App. 210, 924 S.W.2d 819 (1996).

Evidence was insufficient to show an intentional violation of the employer's drug policy where the claimant did not know that Tylenol 3 contained codeine or that it would show up on a drug test, and he only took the medication for his injury. *Niece v. Director*, Emp. Sec. Dep't, 67 Ark. App. 109, 992 S.W.2d 169 (1999).

—Evidence.

Evidence insufficient to find misconduct by claimant. *B.J. McAdams, Inc. v. Daniels*, 269 Ark. 693, 600 S.W.2d 418 (1980); *Willis Johnson Co. v. Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ct. App. 1980); *Brewer v. Everett*, 3 Ark. App. 59, 621 S.W.2d 883 (1981); *Arlington Hotel v. Employment Sec. Div.*, 3 Ark. App. 281, 625 S.W.2d 551 (1981); *Washington v. Everett*, 6 Ark. App. 28, 639 S.W.2d 57 (1982); *Cody v. Everett*, 8 Ark. App. 14, 648 S.W.2d 508 (1983); *Little Rock Wastewater Util. v. Stiles*, 20 Ark. App. 108, 724 S.W.2d 199 (1987); *Sadler v. Stiles*, 22 Ark. App. 117, 735 S.W.2d 708 (1987).

Evidence sufficient to find claimant's misconduct disqualified him from receiving benefits. *Patterson v. Daniels*, 268 Ark. 854, 596 S.W.2d 355 (Ct. App. 1980); *Hall v. Daniels*, 269 Ark. 748, 600 S.W.2d 436 (Ct. App. 1980); *Frierson v. Daniels*, 269 Ark. 724, 600 S.W.2d 446 (Ct. App. 1980); *Ham v. Daniels*, 270 Ark. 961, 606

S.W.2d 604 (1980); *Nibco, Inc. v. Metcalf*, 1 Ark. App. 114, 613 S.W.2d 612 (1981); *Reynolds v. Daniels*, 1 Ark. App. 262, 614 S.W.2d 525 (1981); *Hamby v. Everett*, 4 Ark. App. 52, 627 S.W.2d 266 (1982); *Poff v. Everett*, 8 Ark. App. 83, 648 S.W.2d 815 (1983); *Grigsby v. Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983); *Exson v. Everett*, 9 Ark. App. 177, 656 S.W.2d 711 (1983); *Shipley Baking Co. v. Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986); *Edwards v. Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988); *Grace Drilling Co. v. Director of Labor*, 31 Ark. App. 81, 790 S.W.2d 907 (1990); *Walker v. Director*, Emp. Sec. Dep't., 40 Ark. App. 12, 840 S.W.2d 200 (1992).

Whether the claimant did both or either of the two acts of misconduct charged need not be proved beyond a reasonable doubt; instead, the employer is only required to show by a preponderance of the evidence that one of the charges of misconduct occurred in order to support its position that the claimant was discharged for misconduct in connection with his work. *Grigsby v. Everett*, 8 Ark. App. 188, 649 S.W.2d 404 (1983).

In order to find that a claimant's off-duty activities constitute misconduct in connection with the work, the employer must show, by a preponderance of evidence, that the employee's conduct (1) had some nexus with her work, (2) resulted in some harm to the employer's interest, and (3) was in fact conduct which was (a) violative of some code of behavior contracted between employer and employee, and (b) done with intent or knowledge that the employer's interest would suffer. The code of behavior agreement need not be a formal written contract between employer and employee and may be reasonable rules and regulations of the employer of which the employee has knowledge and is expected to follow. *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983).

Evidence concerning additional items missing from the employer's inventory and traced to claimant's possession, other than the missing property which led to the employer's decision to discharge claimant, did not inject a new issue into the case that claimant had no opportunity to rebut. *Atkinson v. Director of Labor*, 16 Ark. App. 55, 696 S.W.2d 777 (1985).

Discharged employee did not manifest the requisite culpability for her violation

of employer's rules to constitute misconduct where there was no evidence to indicate that she harbored any wrongful intent, evil design, or intentional disregard of her employer's interest. *Fulgham v. Director, Emp. Sec. Dep't*, 52 Ark. App. 197, 918 S.W.2d 186 (1996).

Court reversed a finding that an employee engaged in misconduct under subdivision (a)(1) by not requesting to use accrued leave time for the military leave because (1) the employer allowed its employees to use accrued vacation or sick time for military leave, (2) the employee had done so with no problem in the past, (3) there was no written policy that the employee was required to request using accrued leave time for his military leave, and (4) there was no evidence that the employee intentionally disregarded company policy or procedure; thus, the matter was remanded with instructions that an order be entered awarding the employee benefits. *Maxfield v. Dir.*, Ark. Empl. Sec. Dep't, 84 Ark. App. 48, 129 S.W.3d 298 (2003).

—Failure to Work.

Where employee refused to work her scheduled hours, and the work schedule did not violate the terms of her hiring agreement, the employee's action of refusing to work the scheduled hours was a willful disregard of her employer's best interests and was, therefore, misconduct. *Kilpatrick v. Director, Ark. Emp. Sec. Dep't.*, 55 Ark. App. 193, 934 S.W.2d 232 (1996).

Employee who took unauthorized vacation was properly discharged for misconduct in connection with his work. *Smith v. Arkansas Emp. Sec. Dep't*, 55 Ark. App. 348, 934 S.W.2d 952 (1996).

—Fighting.

Evidence of fighting not sufficient to constitute misconduct. *Milner v. Daniels*, 269 Ark. 762, 600 S.W.2d 429 (Ct. App. 1980); *Hodges v. Everett*, 2 Ark. App. 125, 617 S.W.2d 29 (1981).

Where black employee was discharged for being the aggressor in a fight with a white employee on company property, the board of review must make findings of fact and conclusions as to whether the employee's discharge was racially motivated in light of the fact that a white employee who was involved in a fight with a black super-

visor several years before the present incident was retained with a suspension; an employer is not permitted to use an employee's misconduct as a pretext for discrimination. *Woodus v. Director of Labor*, 3 Ark. App. 1, 621 S.W.2d 869 (1981).

Evidence sufficient to support the board of review's finding that claimant was discharged from his job for provoking a fight with a co-worker. *Swan v. Stiles*, 16 Ark. App. 27, 696 S.W.2d 765 (1985).

Although discharged employee was involved in a fight with another employee, resulting in her termination, the employee was entitled to unemployment compensation benefits because she was not guilty of a willful violation of the rules of her employer. *Fulgham v. Director, Emp. Sec. Dep't*, 52 Ark. App. 197, 918 S.W.2d 186 (1996).

—Incarceration.

A claimant, who was unable to attend work because he was incarcerated in a matter that was ultimately dismissed as a matter of law, has not committed misconduct under this section. *Fleming v. Director, Ark. Emp. Sec. Dep't*, 73 Ark. App. 86, 40 S.W.3d 820 (2001).

A claimant did not commit misconduct where he was incarcerated for allegedly failing to make proper child-support payments, but the case against him was dismissed as a matter of law, notwithstanding the finding by the Appeal Tribunal that the claimant's failure to pay child support resulted in his incarceration and that this was an intentional disregard of his employer's interest. *Fleming v. Director, Ark. Emp. Sec. Dep't*, 73 Ark. App. 86, 40 S.W.3d 820 (2001).

—Intoxication.

Evidence of claimant's intoxication sufficient to support finding of misconduct and denial of benefits. *Weavers v. Daniels*, 1 Ark. App. 55, 613 S.W.2d 108 (1981); *Aaron v. Everett*, 6 Ark. App. 424, 644 S.W.2d 301 (1982).

Where claimant's own testimony indicated that he reported for work under the influence of intoxicants, he was not prejudiced by inadmissible evidence later provided to board which tended to show additional alcohol incidents involving claimant. *Aaron v. Everett*, 6 Ark. App. 424, 644 S.W.2d 301 (1982).

—Language.

"Stop meddling in my business" and "stop" spoken by a person found to have been acting in self-defense were not words that rose to the level of misconduct for purposes of denial of benefits. *Rollins v. Director, Emp. Sec. Dep't*, 58 Ark. App. 58, 945 S.W.2d 410 (1997).

—Negligence.

Driver employee who in a six-month period had five accidents involving stationary objects engaged in a pattern of recurring negligence that rose to the level of misconduct. *Kimble v. Director, Ark. Emp. Sec. Dep't*, 60 Ark. App. 36, 959 S.W.2d 66 (1997).

—Off Duty.

There is a three-part test for determining whether an employee's off-duty conduct will be considered misconduct in connection with the work: first, there must exist a nexus between the employee's work and his or her off-duty activities; second, it must be shown that the off-duty activities resulted in harm to the employer's interests; and third, the off-duty conduct must be violative of some code of behavior contracted between the employer and employee, and the employee's conduct must be done with the intent or knowledge that the employer's interests would suffer. *Rucker v. Price*, 52 Ark. App. 126, 915 S.W.2d 315 (1996).

—Professional License.

The claimant was not barred from receiving unemployment compensation benefits on the basis of misconduct where (1) she was employed as a respiratory therapist at the time legislation was passed which required persons to obtain a license to practice respiratory care, (2) she studied and prepared for the certification examination, but failed it, and (3) the employer fired the claimant upon the expiration of her temporary license. *Washington Regional Medical Ctr. v. Director, Emp. Sec. Dep't*, 64 Ark. App. 41, 979 S.W.2d 94 (1998).

—Quality of Work Product.

Where employee had had the ability to perform her job and was described by her supervisor as a "great asset" until her error rate exceeded company standards, but where employee made the same mistakes repeatedly and each time was given

instructions for correction of her mistakes, even though there was no evidence that she intended to harm employer's interest, employee's recurring negligence in failing to correct her mistakes established misconduct. *Perry v. Gaddy*, 48 Ark. App. 128, 891 S.W.2d 73 (1995).

Employee was not disqualified from obtaining benefits where employer stated employee was discharged for poor job performance; employee's poor work performance did not amount to misconduct. *Greenberg v. Director, Emp. Sec. Dep't*, 53 Ark. App. 295, 922 S.W.2d 5 (1996).

Although customer service employee was fired for poor job performance, the finding that her performance constituted misconduct was not supported by substantial evidence. *Blackford v. Arkansas Emp. Sec. Dep't*, 55 Ark. App. 418, 935 S.W.2d 311 (1996).

Unemployment benefits were improperly awarded to terminated employee where the employee's job performance was frequently faulty in that he failed to properly clean equipment and put up tools over a period of several months, and the Board failed to consider that those were essential tasks outlined in the company rule book; substantial evidence did not support the Board's conclusion that the employee was entitled to written notice that the company would not tolerate his repeated shortcomings in performing tasks that he was required to do. *Teravista Landscape v. Williams*, 88 Ark. App. 57, 194 S.W.3d 800 (2004).

—Questions of Fact.

A question of fact existed as to whether employee, who was discharged for failure to follow the employer's policy, was disqualified from receiving benefits because she was discharged for misconduct in connection with her work. *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980).

Whether or not the acts of the employee are willful and wanton so as to constitute misconduct is a question of fact for the board of review to determine. *Dillaha Fruit Co. v. Everett*, 9 Ark. App. 51, 652 S.W.2d 643 (1983); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983); *Exson v. Everett*, 9 Ark. App. 177, 656 S.W.2d 711 (1983); *Maybelline Co. v. Stiles*, 10 Ark. App. 169, 661 S.W.2d 462 (1983); *W.C. Lee Constr. v. Stiles*, 13 Ark. App. 303, 683 S.W.2d 616 (1985).

Whether the employee's acts are willful or merely the result of unsatisfactory conduct or unintentional failure of performance is a fact question for the Board to decide. *George's Inc. v. Director*, 50 Ark. App. 77, 900 S.W.2d 590 (1995).

—Speeding.

An over-the-road truck driver was terminated for misconduct when he exceeded a safe driving speed under high-wind conditions, had been counseled to either slow down or stop during inclement conditions, had agreed in writing to do so, and was on probationary status. *McKissick v. Director of Ark. Emp. Sec. Dep't*, 61 Ark. App. 266, 966 S.W.2d 921 (1998).

Proceedings.

Where board of review affirmed the appeal referee's denial of unemployment benefits but modified the referee's decision from disqualification under subsection (a) to show disqualification within the meaning of subsection (b), the claimant was in no way harmed by the modification since both disqualifications are couched in terms of misconduct at work, and there was no evidence that the claimant was surprised at the charged misconduct in connection with her work. *Williams v. Employment Sec. Div., Ark. Dep't of Labor*, 267 Ark. 1156, 594 S.W.2d 52 (Ct. App. 1980).

Where an employee sought unemployment benefits for his improper discharge, but his employer claimed that the benefits should be denied because he was discharged for misconduct in connection with his work or that the claimant was ineligible for refusing the employer's offer to rehire him without any conditions attached, all of the matters pertaining to the employee's discharge and the purported offer and acceptance of his reinstatement should have been dealt with in one proceeding, and therefore the cause was remanded so that such a proceeding could be held. *Champion Parts Rebuilders, Inc. v. Arkansas Dep't of Labor*, 268 Ark. 719, 594 S.W.2d 868 (Ct. App. 1980).

Religious Beliefs.

When an employee was fired because he refused to work on a Saturday due to his religious beliefs, the board of review's decision to award unemployment benefits was supported by substantial evidence.

W.C. Lee Constr. v. Stiles, 13 Ark. App. 303, 683 S.W.2d 616 (1985).

Res Judicata.

Circuit court judgment denying worker unemployment benefits under subsection (a) is not res judicata as to a subsequent action for damages for discharge in violation of a labor contract. *Andrews v. Victor Metal Prods. Corp.*, 237 Ark. 540, 374 S.W.2d 816 (1964).

Scope of Review.

The issue of misconduct is a question of fact for the Board of Review, and, on appeal, the Board's findings are conclusive if supported by substantial evidence. *A. Tenenbaum Co. v. Director of Labor*, 32 Ark. App. 43, 796 S.W.2d 348 (1990); *Greenberg v. Director, Emp. Sec. Dep't*, 53 Ark. App. 295, 922 S.W.2d 5 (1996).

Substantial Evidence.

Substantial evidence supported the award of unemployment benefits, because the employee was discharged, and due to the inclement weather, the Arkansas Board of Review found that the employee had good reason for refusing to report to work and that her refusal under the circumstances did not constitute a willful disregard of the employer's interests; it had been snowing on the day in question, police advised travelers to exercise caution on bridges, and the employee had to travel over at least one bridge to get to work. *Ark. Internal Med. Clinic v. Dir., Dep't of Workforce Servs.*, 2012 Ark. App. 95, — S.W.3d — (2012).

Cited: *Cash v. Rocket Mfg. Co.*, 223 Ark. 561, 267 S.W.2d 318 (1954); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Daniels v. Hillcrest Homes, Inc.*, 268 Ark. 576, 594 S.W.2d 64 (Ct. App. 1980); *Jordan v. Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ct. App. 1980); *Stewart v. Daniels*, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980); *Cross v. Daniels*, 271 Ark. 201, 607 S.W.2d 680 (1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Ireland v. Daniels*, 2 Ark. App. 44, 616 S.W.2d 33 (1981); *Jeffreys v. Everett*, 6 Ark. App. 265, 640 S.W.2d 465 (1982); *Ramsey v. Everett*, 7 Ark. App. 120, 644 S.W.2d 621 (1983); *Jones v. Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Stiles v.*

Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984); Reynolds Metals Co. v. Couch, 12 Ark. App. 267, 675 S.W.2d 838 (1984); Helena-West Helena Sch. Dist. v. Stiles, 15 Ark. App. 30, 688 S.W.2d 326 (1985); Shipley Baking Co. v. Stiles, 17 Ark. App. 72, 703 S.W.2d 465 (1986); Walker v. Di-

rector, Emp. Sec. Dep't., 40 Ark. App. 12, 840 S.W.2d 200 (1992); Walls v. Dir., Employment Sec. Div., 74 Ark. App. 424, 49 S.W.3d 670 (2001); Missouri v. Dir., Empl. Sec. Dep't, 84 Ark. App. 172, 137 S.W.3d 436 (2003).

11-10-515. Disqualification — Failure or refusal to apply for or accept suitable work.

(a)(1)(A) If so found by the Director of the Department of Workforce Services, an individual shall be disqualified for benefits if he or she has failed without good cause:

(i) To apply for available suitable work when so directed by a Department of Workforce Services office; or

(ii) To accept available suitable work when offered.

(B) The disqualification under subdivision (a)(1)(A) of this section shall continue until, subsequent to filing a claim, he or she has had at least thirty (30) days of employment covered by an unemployment compensation law of this state, another state, or the United States and shall begin with the week in which the failure to apply for or accept available suitable work occurred.

(2)(A) An individual who applies for benefits is disqualified for benefits if he or she was rejected for offered employment as the direct result of a failure:

(i) To appear for a United States Department of Transportation-qualified drug screen after having received a bona fide job offer of suitable work subject to passage of the drug screen; or

(ii) To pass a United States Department of Transportation-qualified drug screen by testing positive for an illegal drug after having received a bona fide job offer of suitable work.

(B) The disqualification under subdivision (a)(2)(A) of this section shall continue until:

(i) Subsequent to the date of the disqualification, the claimant has been paid wages in two (2) quarters for insured work totaling not less than thirty-five (35) times his or her weekly benefit amount; and

(ii) The disqualified individual passes a United States Department of Transportation-qualified drug screen by testing negative for illegal drugs.

(b)(1) No individual shall be disqualified from the receipt of benefits with respect to any week in which he or she is in training with the approval of the director by reason of the application of provisions in subsection (a) of this section.

(2) For the purpose of this subsection, the approval of the director shall be based on the following considerations:

(A) The claimant's skills must be either obsolete or the demands for his or her skills in his or her labor market must be such as to make employment opportunities for him or her in that labor market minimal and not likely to improve;

(B) The claimant must possess aptitudes or skills which can be usefully supplemented within a short time by retraining;

(C) The training must be for an occupation for which there is a substantial and recurring demand; and

(D) The claimant must produce evidence of continued attendance and satisfactory progress.

(c)(1) In determining whether or not any work is suitable for an individual and in determining the existence of good cause for voluntarily leaving his or her work under § 11-10-513, there shall be considered, among other factors and in addition to those enumerated in subsection (d) of this section, the degree of risk involved to his or her health, safety, and morals, his or her physical fitness and prior training, his or her experience and prior earnings, the length of his or her unemployment, his or her prospects for obtaining work in his or her customary occupation, the distance of available work from his or her residence, and prospects for obtaining local work.

(2) Work offered to an individual by a base-period or last employer at earnings equal to or greater than the individual earned from the base-period or last employer shall be deemed to be suitable work unless any of the factors above are applicable and it would be contrary to good conscience to deem the work suitable.

(d) Notwithstanding any other provisions of this chapter, no work shall be deemed suitable and benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) If the position offered is vacant due to a strike, lockout, or other labor dispute;

(2) If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or

(3) If as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization.

History. Acts 1941, No. 391, § 5; 1943, No. 138, § 30; 1949, No. 155, § 5; 1955, No. 395, § 13; 1971, No. 35, § 9; A.S.A. 1947, § 81-1106; Acts 1991, No. 100, § 28; 1997, No. 234, § 13; 2001, No. 755, § 1; 2007, No. 454, § 2; 2011, No. 861, § 5.

Amendments. The 2011 amendment rewrote (a)(1)(B); deleted “after July 31, 2007” following “applies for benefits” in (a)(2)(A); and added (a)(2)(B)(i).

CASE NOTES

ANALYSIS	Good Cause.
In General.	Labor Dispute.
Construction.	Private Agreement.
Evidence.	Remand.
	Suitable Work.

Union Membership.

In General.

Sections 11-10-512 — 11-10-519 are mutually exclusive. *Little Rock Furn. Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957).

Where the only evidence presented was employee's testimony that he was subjected to verbal and physical abuse on the job, employee quit for good cause and was entitled to unemployment benefits. *Gunter v. Dir., Empl. Sec. Dep't*, 82 Ark. App. 346, 107 S.W.3d 902 (2003).

Construction.

It must be remembered in interpreting and applying this section that the basic design of this section is to protect the employee from the economic consequences of unemployment through no fault of the employee; and, to that end, this section should be liberally construed. *Whitlow v. American Greetings Co.*, 268 Ark. 1122, 599 S.W.2d 410 (Ct. App. 1980).

The term "condition" in subdivision (d)(3) of this section, providing that a recipient of unemployment compensation was not required to accept a job which, as a "condition" of employment, required the recipient to resign from a bona fide labor organization, did not mean as a "result" of accepting employment; rather, the term meant as a "requirement" of employment and referred to restrictions contained in the offer of employment made by the employer. *Ark. Okla. Gas Corp. v. Dir., Ark. Empl. Sec. Dep't*, 80 Ark. App. 251, 94 S.W.3d 366 (2002).

Evidence.

Under the informal procedure that obtains before the board a physician who has treated an unemployment compensation claimant can testify as to the possible effect of a proposed job on the claimant based on her statements. *Terry Dairy Prods. Co. v. Cash*, 224 Ark. 576, 275 S.W.2d 12 (1955).

Good Cause.

Where an owner of a company used an expletive when calling a former employee a liar after she denied methamphetamine use, the employee voluntarily quit with good cause under § 11-10-513 when she left the premises a few minutes later; thus, substantial evidence supported a finding that she was entitled to unemploy-

ment benefits. *Pocahontas Elecs. v. Dir., Dep't of Workforce Servs.*, 96 Ark. App. 227, 240 S.W.3d 130 (2006).

Labor Dispute.

The purpose of this chapter is to relieve some of the economic consequences of involuntary unemployment, and not to penalize or reward either the employee or employer engaged in a legitimate labor dispute; thus the law's only concern with labor disputes is for the determination, when a claim is filed for benefits, whether claimant's unemployment is voluntary or involuntary. *City of Fort Smith v. Moore*, 269 Ark. 617, 599 S.W.2d 750 (1980).

When employees cease all strike activity and apply unconditionally for reinstatement and the employer has resumed normal operations, the labor dispute is regarded as terminated and claimants may not be disqualified under the labor dispute provision. *City of Fort Smith v. Moore*, 269 Ark. 617, 599 S.W.2d 750 (1980).

Private Agreement.

A private agreement between an employee and an employer cannot affect the eligibility of the employee for unemployment benefits. To hold that by private agreement one who refuses reasonable employment is entitled to unemployment benefits would make his eligibility dependent upon negotiations between the employer and the employee or his bargaining agent rather than on the statute. *Reynolds Metals Co. v. Couch*, 8 Ark. App. 37, 648 S.W.2d 497 (1983).

Remand.

Where the board of review did not make a finding of fact on a material issue, the case must be remanded to the board of review for findings upon that issue. *Hays v. Batesville Mfg. Co.*, 251 Ark. 659, 473 S.W.2d 926 (1971).

Suitable Work.

The duty and obligation of an unemployed individual, who has made application for benefits, to accept available and suitable work may exist regardless of whether the work is temporary employment or full-time employment; moreover, suitability of work does not require that the job offered must be equal in every respect to the prior working conditions, that the pay be equal to or better than the

previous wage scale. *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (1980); *Roberson v. Director of Labor*, 28 Ark. App. 337, 775 S.W.2d 82 (1989).

Evidence sufficient to find that benefits should have been granted since work offered claimant was not suitable. *Oxford v. Daniels*, 268 Ark. 991, 597 S.W.2d 844 (Ct. App. 1980); *Price v. Everett*, 2 Ark. App. 98, 616 S.W.2d 766 (1981); *Oxford v. Daniels*, 2 Ark. App. 200, 618 S.W.2d 171 (1981).

Where following their employer's reduction in work force, several employees were, in accordance with the seniority provisions of a collective bargaining agreement, offered alternative positions with the employer at lower-skilled positions and at a lower rate of pay, the board of review should have considered the suitability of the alternative work offered in determining whether the employees were offered suitable work which they refused, thus disqualifying them from benefits, despite the claimants' contention that they had good cause to reject the alternative positions because their acceptance of the positions would have resulted in the discharge of fellow employees of less seniority. *Reynolds Metals Co. v. Couch*, 8 Ark. App. 37, 648 S.W.2d 497 (1983).

The term "good cause" means a justifiable reason for not accepting a particular job; and the question of what constitutes "good cause" is a question of fact for the board. *Roberson v. Director of Labor*, 28 Ark. App. 337, 775 S.W.2d 82 (1989).

Employee's decision not to commute to new place of employment did not constitute failure to accept suitable work where the commute was 50 additional miles, the travel expenses, although partially reimbursed, would result in a net decrease in pay, and where the inherent conditions of the mountainous road presented a safety hazard. *Carpenter v. Director of Ark. Emp. Sec. Dep't*, 55 Ark. App. 39, 929 S.W.2d 177 (1996).

Union Membership.

Where applicant for unemployment benefits refused to accept offered employment, contending rules of the labor union to which he belonged would subject him to

a fine and possible discharge from the union for accepting a job paying less than the union scale, this did not protect him from disqualification for unemployment benefits since he was not required to resign from the labor organization. *Thornbrough v. Stewart*, 232 Ark. 53, 334 S.W.2d 699 (1960).

Loss of union privileges, whether by union rules or by provisions in a collective bargaining agreement, did not provide good cause, under subdivision (d)(3) of this section, for rejecting a job and did not render offered employment unsuitable for unemployment compensation purposes. *Ark. Okla. Gas Corp. v. Dir., Ark. Empl. Sec. Dep't*, 80 Ark. App. 251, 94 S.W.3d 366 (2002).

Cited: *Cash v. Rocket Mfg. Co.*, 223 Ark. 561, 267 S.W.2d 318 (1954); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Ross v. Daniels*, 266 Ark. 1056, 599 S.W.2d 390 (Ct. App. 1979); *Alexander v. Walnut Fork Design*, 267 Ark. 1130, 593 S.W.2d 493 (Ct. App. 1980); *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980); *Jordan v. Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ct. App. 1980); *Stewart v. Daniels*, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980); *Wacaster v. Daniels*, 270 Ark. 190, 603 S.W.2d 907 (1980); *Cross v. Daniels*, 271 Ark. 201, 607 S.W.2d 680 (1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Ireland v. Daniels*, 2 Ark. App. 44, 616 S.W.2d 33 (1981); *Everett v. Jones*, 277 Ark. 162, 639 S.W.2d 739 (1982); *Jeffreys v. Everett*, 6 Ark. App. 265, 640 S.W.2d 465 (1982); *Ramsey v. Everett*, 7 Ark. App. 120, 644 S.W.2d 621 (1983); *Jones v. Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Stiles v. Hopkins*, 282 Ark. 207, 666 S.W.2d 703 (1984); *Reynolds Metals Co. v. Couch*, 12 Ark. App. 267, 675 S.W.2d 838 (1984); *Helena-West Helena Sch. Dist. v. Stiles*, 15 Ark. App. 30, 688 S.W.2d 326 (1985); *Shipley Baking Co. v. Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986).

11-10-516. Disqualification — Refusal to report after layoff.

(a)(1) If so found by the Director of the Department of Workforce Services, an individual shall be disqualified for benefits if while on a layoff of ten (10) weeks or less, he or she refuses to report for work within one (1) week after notice of recall to the same job or to a suitable job similar to the one from which he or she was laid off, or if while unemployed, he or she voluntarily removes his or her name from a recall list set forth in a written contract of a base-period employer, provided that the employer files a written notice of the refusal of recall or removal from a recall list with the Department of Workforce Services within seven (7) days of the occurrence.

(2) The disqualification shall begin on the date of receipt of the written notice of refusal of recall or removal from the recall list by the department and shall continue until, subsequent to filing his or her claim, he or she has had at least thirty (30) days of employment covered by an unemployment compensation law of this state, or another state, or of the United States.

(b) No individual shall be disqualified under this section if he or she refuses to report for recall to the job or removes his or her name from a recall list as described in subsection (a) of this section because he or she is employed on a full-time basis, has a written offer of a job, or because of circumstances of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification.

History. Acts 1941, No. 391, § 5; 1955, 1947, § 81-1106; Acts 1987, No. 753, § 15; No. 395, § 14; 1983, No. 482, § 18; A.S.A. 2005, No. 902, § 3.

CASE NOTES**ANALYSIS**

In General.
Construction.

In General.

Sections 11-10-512 — 11-10-519 are mutually exclusive. *Little Rock Furn. Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957).

Construction.

It must be remembered in interpreting and applying this section that the basic design of this chapter is to protect the employee from the economic consequences of unemployment through no fault of the employee; and, to that end, this chapter should be liberally construed. *Whitlow v. American Greetings Co.*, 268 Ark. 1122, 599 S.W.2d 410 (Ct. App. 1980).

Cited: *Cash v. Rocket Mfg. Co.*, 223 Ark. 561, 267 S.W.2d 318 (1954); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281

(1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980); *Jordan v. Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ct. App. 1980); *Stewart v. Daniels*, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980); *Cross v. Daniels*, 271 Ark. 201, 607 S.W.2d 680 (1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Ireland v. Daniels*, 2 Ark. App. 44, 616 S.W.2d 33 (1981); *Jeffreys v. Everett*, 6 Ark. App. 265, 640 S.W.2d 465 (1982); *Ramsey v. Everett*, 7 Ark. App. 120, 644 S.W.2d 621 (1983); *Jones v. Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Stiles v. Hopkins*, 282 Ark. 207, 666 S.W.2d 703 (1984); *Reynolds Metals Co. v. Couch*, 12 Ark. App. 267, 675 S.W.2d 838 (1984); *Helena-West Helena Sch. Dist. v. Stiles*, 15 Ark. App. 30, 688 S.W.2d

326 (1985); Shipley Baking Co. v. Stiles, 17 Ark. App. 72, 703 S.W.2d 465 (1986).

11-10-517. Disqualification — Receipt of other remunerations.

If so found by the Director of the Department of Workforce Services, an individual shall be disqualified for benefits for any week with respect to which he or she receives or has received remuneration in the form of:

(1) SEPARATION PAYMENTS.

(A)(i) Separation payments shall be treated as earnings in accordance with § 11-10-503.

(ii) Separation payments in excess of those covering a period of eight (8) weeks of wages and an armed services severance payment paid to a former member of the United States armed services shall not be disqualifying under the terms of this section.

(B) Separation payments provided in the form of a lump sum are disqualifying only for the week in which they are received.

(C) Remuneration paid as back pay in settlement of a claim or grievance and supplemental unemployment benefits shall not be disqualifying;

(2) Unemployment benefits under an unemployment compensation law of another state or of the United States;

(3)(A) Any governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment received with respect to the week and that is based on the previous work of the claimant if payment is received under a plan maintained or contributed to by a base-period employer.

(B)(i) However, the amount of unemployment benefits payable to the individual for the week shall be reduced, but not below zero, by an amount equal to the amount of the pension, retirement or retired pay, annuity, or other payment that is reasonably attributable to the week.

(ii) Any weekly benefit amount that is reduced because of the receipt of remuneration as defined under this section and that is not an even multiple of one dollar (\$1.00) shall be rounded to the next lower multiple of one dollar (\$1.00).

(C) If payments referred to in this subdivision (3) are being received by any individual under the federal Social Security Act, the director shall take into account the individual's contribution and make no reduction in the weekly benefit amount;

(4)(A) Training and retraining allowance provided for by appropriation of the Congress of the United States.

(B) However, this subdivision (4) does not apply if the claimant has met the benefit eligibility conditions set out in §§ 11-10-507 — 11-10-511 and other sections of this chapter;

(5) VACATION PAYMENTS.

(A) Vacation payments shall be treated as earnings in accordance with § 11-10-503 with respect to the week or weeks in which the vacation period occurred.

(B) For the purpose of this subdivision (5), the employer shall promptly report the week or weeks involved in the vacation period as well as the corresponding amount of vacation pay with respect to such week or weeks.

(C) Any vacation payments received due to a permanent separation from employment shall not be disqualifying nor deductible under this section;

(6) Bonus payments that shall be treated as earnings in accordance with § 11-10-503 only for the week in which the payment is received;

(7) SICK PAYMENTS.

(A) Sick payments shall be treated as earnings in accordance with § 11-10-503 with respect to the week or weeks in which the sick-pay period occurred.

(B) For the purpose of this subdivision (7), the employer shall promptly report the week or weeks involved in the sick-pay period as well as the corresponding amount of sick payments with respect to the week or weeks.

(C) However, any sick payments received due to a permanent separation from employment shall not be disqualifying nor deductible under this section; and

(8) HOLIDAY PAYMENTS.

(A) Holiday payments shall be treated as earnings in accordance with § 11-10-503 for the week or weeks in which the holiday occurred.

(B) For the purpose of this subdivision (8), the employer shall promptly report the week or weeks involved in the holiday pay period and the corresponding amount of holiday payments for that holiday pay period.

History. Acts 1941, No. 391, §§ 3, 5; 1949, No. 155, § 5; 1953, No. 162, § 3; 1955, No. 395, § 16; 1963, No. 93, §§ 4, 6; 1971, No. 35, §§ 7, 9; 1972 (Ex. Sess.), No. 65, § 1; 1975, No. 154, § 1; 1975, No. 609, § 2; 1975, No. 627, § 1; 1975 (Extended Sess., 1976), No. 1083, §§ 6, 7; 1977, No. 366, § 7; 1977, No. 376, § 11; 1979, No. 492, § 8; 1979, No. 922, § 8; 1981 (Ex. Sess.), No. 37, § 8; 1983, No. 482, §§ 9, 18-20; A.S.A. 1947, §§ 81-1104, 81-1106; reen. Acts 1987, No. 672, §§ 5, 6; Acts 1991, No. 48, § 4; 1993, No. 6, § 8; 2001,

No. 1367, § 6; 2003, No. 1223, § 6; 2005, No. 902, § 4; 2007, No. 490, § 6.

A.C.R.C. Notes. Part of this section was reenacted by Acts 1987, No. 672, §§ 5, 6. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

U.S. Code. The Social Security Act, referred to in this section, is codified primarily as 42 U.S.C. § 301 et seq.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General As-

sembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS

In General.
Construction.
Belated Wages.
Dismissal Payments.
Retirement Pay.
Vacation Pay.

In General.

Sections 11-10-512 — 11-10-519 are mutually exclusive. *Little Rock Furn. Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957).

Construction.

It must be remembered in interpreting and applying this section that the basic design of this chapter is to protect the employee from the economic consequences of unemployment through no fault of the employee; and, to that end, this chapter should be liberally construed. *Whitlow v. American Greetings Co.*, 268 Ark. 1122, 599 S.W.2d 410 (Ct. App. 1980).

Belated Wages.

Claimant was improperly disqualified from receiving benefits for failing to disclose the material fact that his former employer had made payments to him during three weeks for which he claimed benefits, where the evidence revealed that the claimant was not working for the employer during those three weeks and the payments he received were only belated payments of wages for work that the claimant performed for the employer prior to the termination of his employment. *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983).

Dismissal Payments.

Dismissal payments are payments made to an employee by employer upon employee's discharge from employment. *Thornbrough v. Gage*, 234 Ark. 15, 350 S.W.2d 306 (1961).

Lump-sum severance payments made under supplemental unemployment benefit plan between employer and union to employees when plant was discontinued constituted disqualifying dismissal payments under the statute, which payments disqualified such employees from receiving unemployment compensation. *Thorn-*

brough v. Gage, 234 Ark. 15, 350 S.W.2d 306 (1961).

Where lump-sum dismissal payments made under supplemental unemployment benefit plan between employer and union to employees when plant was discontinued were calculated upon basis of employees' average wages during year preceding their dismissal, the period of their disqualification regarding unemployment compensation should be the period of time for which their dismissal payments equal the payment in full of their wages at the average rates. *Thornbrough v. Gage*, 234 Ark. 15, 350 S.W.2d 306 (1961).

Retirement Pay.

Retirement is compensation currently paid but previously earned by an employee, and the various facets of the social security law prevent the benefits payable thereunder from falling into the category of retirement pay, and recipient of unemployment compensation could not be disqualified from receiving unemployment benefits, or be required to take a reduction in benefits, for the period in which he received social security benefits. *Commissioner of Labor v. Renfro*, 253 Ark. 380, 486 S.W.2d 73, 56 A.L.R.3d 547 (1972).

Vacation Pay.

One week's pay paid to an employee as vacation pay during a two-week shutdown of the plant for vacations disqualified the employee for only one week of unemployment benefits and he was entitled to benefits for the remaining week. *Stover v. Deere*, 249 Ark. 334, 461 S.W.2d 393 (1970).

Vacation pay, paid at separation from employment, is to be allocated, until exhaustion, to the weeks immediately following the separation. *Rummel v. Director*, Ark. Emp. Sec. Dep't, 59 Ark. App. 255, 957 S.W.2d 718 (1997).

Cited: *Cash v. Rocket Mfg. Co.*, 223 Ark. 561, 267 S.W.2d 318 (1954); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980); *Jordan v. Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ct. App. 1980); *Stewart v. Daniels*, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980); *Cross v. Daniels*, 271

Ark. 201, 607 S.W.2d 680 (1980); Hodnett v. Daniels, 271 Ark. 479, 609 S.W.2d 122 (1980); Ireland v. Daniels, 2 Ark. App. 44, 616 S.W.2d 33 (1981); Jeffreys v. Everett, 6 Ark. App. 265, 640 S.W.2d 465 (1982); Ramsey v. Everett, 7 Ark. App. 120, 644 S.W.2d 621 (1983); Jones v. Director of Labor, 8 Ark. App. 234, 650 S.W.2d 601 (1983); Feagin v. Everett, 9 Ark. App. 59,

652 S.W.2d 839 (1983); Linscott v. Director of Labor, 9 Ark. App. 103, 653 S.W.2d 150 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984); Reynolds Metals Co. v. Couch, 12 Ark. App. 267, 675 S.W.2d 838 (1984); Helena-West Helena Sch. Dist. v. Stiles, 15 Ark. App. 30, 688 S.W.2d 326 (1985); Shipley Baking Co. v. Stiles, 17 Ark. App. 72, 703 S.W.2d 465 (1986).

11-10-518. Disqualification — Certain workers in training program excepted.

(a) Notwithstanding any other provision of this chapter, an adversely affected worker covered by a certification under Subchapter A, Chapter 2, Title II of the Trade Act of 1974 may not be determined to be ineligible or disqualified for unemployment insurance or Trade Act benefits payable under Part I, Subchapter B, Chapter 2, Title II of the Trade Act of 1974 because the individual is in training approved under Part II, Subchapter B, Chapter 2, Title II of the Trade Act of 1974 because of:

(1) Leaving work which is not suitable employment to begin or continue training; or

(2) The application to any such week in training of provisions of this chapter or any state or federal unemployment insurance law relating to availability for work, active search for work, or refusal to accept work.

(b) For purposes of this section, the term "suitable employment" means, with respect to a worker described in this section, work of a substantially equal or higher skill level than the worker's past adversely affected employment and wages for such work at not less than eighty percent (80%) of the worker's average weekly wage.

History. Acts 1941, No. 391, § 5; 1943, No. 138, § 30; 1947, No. 398, § 4; 1949, No. 155, § 5; 1953, No. 162, § 3; 1955, No. 395, §§ 17, 18; 1963, No. 93, § 6; 1977, No. 376, § 11; 1979, No. 492, § 9; 1979, No. 922, § 9; 1981, No. 43, §§ 6, 7; 1981

(1st Ex. Sess.), No. 37, § 1; A.S.A. 1947, § 81-1106; 2005, No. 902, § 5.

U.S. Code. Title II, Chapter 2, of the Trade Act of 1974 referred to in this section is codified as 19 U.S.C. § 2271 et seq.

CASE NOTES

ANALYSIS

In General.
Construction.

In General.

Sections 11-10-512 — 11-10-519 are mutually exclusive. Little Rock Furn. Mfg. Co. v. Commissioner of Labor, 227 Ark. 288, 298 S.W.2d 56 (1957).

Construction.

It must be remembered in interpreting and applying this section that the basic

design of this chapter is to protect the employee from the economic consequences of unemployment through no fault of the employee; and, to that end, this chapter should be liberally construed. Whitlow v. American Greetings Co., 268 Ark. 1122, 599 S.W.2d 410 (Ct. App. 1980).

Cited: Cash v. Rocket Mfg. Co., 223 Ark. 561, 267 S.W.2d 318 (1954); Garrett v. Cline, 257 Ark. 829, 520 S.W.2d 281 (1975); Harris v. Daniels, 263 Ark. 897, 567 S.W.2d 954 (1978); Stagecoach Motel v. Krause, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980); Jordan v. Dukes, 269 Ark.

581, 600 S.W.2d 21 (Ct. App. 1980); Stewart v. Daniels, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980); Cross v. Daniels, 271 Ark. 201, 607 S.W.2d 680 (1980); Hodnett v. Daniels, 271 Ark. 479, 609 S.W.2d 122 (1980); Ireland v. Daniels, 2 Ark. App. 44, 616 S.W.2d 33 (1981); Jeffreys v. Everett, 6 Ark. App. 265, 640 S.W.2d 465 (1982); Ramsey v. Everett, 7 Ark. App. 120, 644 S.W.2d 621 (1983); Jones v. Director of Labor, 8 Ark. App. 234, 650 S.W.2d 601

(1983); Feagin v. Everett, 9 Ark. App. 59, 652 S.W.2d 839 (1983); Linscott v. Director of Labor, 9 Ark. App. 103, 653 S.W.2d 150 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984); Reynolds Metals Co. v. Couch, 12 Ark. App. 267, 675 S.W.2d 838 (1984); Helena-West Helena Sch. Dist. v. Stiles, 15 Ark. App. 30, 688 S.W.2d 326 (1985); Shipley Baking Co. v. Stiles, 17 Ark. App. 72, 703 S.W.2d 465 (1986).

11-10-519. Disqualification — Penalty for false statement or misrepresentation.

If so found by the Director of the Department of Workforce Services, an individual shall be disqualified for benefits:

(1) If he or she willfully makes a false statement or misrepresentation of a material fact or willfully fails to disclose a material fact in filing an initial claim or a claim renewal. He or she shall be disqualified from the date of filing the claim until he or she has ten (10) weeks of employment in each of which he or she has earned wages equal to at least his or her weekly benefit amount;

(2)(A) For any continued week claimed with respect to which the employee has willfully made a false statement or misrepresentation of a material fact or willfully fails to disclose a material fact in obtaining or attempting to obtain any benefits, and for an additional thirteen (13) weeks of unemployment, as defined in § 11-10-512, and which shall commence with Sunday of the first week with respect to which a claim is filed commencing with the week of delivery or mailing of the determination of disqualification under this section.

(B) In addition to the thirteen (13) weeks of disqualification, a disqualification of three (3) weeks shall be imposed for each week of failure or falsification. Any weekly benefits payable subsequent to the date of delivery or mailing the determination shall be reduced fifty percent (50%) rounded to the next lower dollar, and the remainder of maximum benefits shall be reduced accordingly. The reduction shall apply only to benefits payable within the benefit year of the claim with respect to which the claimant willfully made a false statement or misrepresentation; and

(3) The disqualification shall not be applied after five (5) years have elapsed from the date of delivery or mailing the determination of disqualification under this section, but all overpayments established by the determination of disqualification shall be collected as otherwise provided by this chapter.

History. Acts 1941, No. 391, § 5; 1949, No. 155, § 5; 1955, No. 395, § 19; 1963, No. 93, § 6; 1971, No. 35, § 9; 1983, No.

482, § 21; A.S.A. 1947, § 81-1106; Acts 2001, No. 1367, § 7; 2003, No. 1223, § 7.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS

In General.
Construction.
Evidence.

In General.

Sections 11-10-512 — 11-10-519 are mutually exclusive. *Little Rock Furn. Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957).

Construction.

It must be remembered in interpreting and applying this section that the basic design of this chapter is to protect the employee from the economic consequences of unemployment through no fault of the employee; and, to that end, this chapter should be liberally construed. *Whitlow v. American Greetings Co.*, 268 Ark. 1122, 599 S.W.2d 410 (Ct. App. 1980).

This section and § 11-10-532 required the recipient to repay all benefits received during the period she was disqualified for committing fraud, not just the amount of overpayment after calculating unreported income. *Hunt v. Director, Emp. Sec. Dep't*, 57 Ark. App. 152, 942 S.W.2d 873 (1997).

Evidence.

Evidence sufficient to find that claimant was disqualified from receiving benefits

because he made a false statement of material fact when filing claim. *Eden v. Daniels*, 269 Ark. 690, 600 S.W.2d 416 (Ct. App. 1980).

Cited: *Cash v. Rocket Mfg. Co.*, 223 Ark. 561, 267 S.W.2d 318 (1954); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980); *Jordan v. Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ct. App. 1980); *Stewart v. Daniels*, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980); *Cross v. Daniels*, 271 Ark. 201, 607 S.W.2d 680 (1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Ireland v. Daniels*, 2 Ark. App. 44, 616 S.W.2d 33 (1981); *Jeffreys v. Everett*, 6 Ark. App. 265, 640 S.W.2d 465 (1982); *Ramsey v. Everett*, 7 Ark. App. 120, 644 S.W.2d 621 (1983); *Jones v. Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Stiles v. Hopkins*, 282 Ark. 207, 666 S.W.2d 703 (1984); *Reynolds Metals Co. v. Couch*, 12 Ark. App. 267, 675 S.W.2d 838 (1984); *Helena-West Helena Sch. Dist. v. Stiles*, 15 Ark. App. 30, 688 S.W.2d 326 (1985); *Shipley Baking Co. v. Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986).

11-10-520. Claims — Posting of information by employer.

(a) Each employer shall post and maintain, in places readily accessible to individuals in the employer's employ, printed statements concerning benefit rights, claims for benefits, and such other matters relating to the administration of this chapter as the Director of the Department of Workforce Services may by regulation prescribe.

(b) Each employer shall supply to those individuals copies of such printed statements or other materials relating to claims for benefits when, and as, the director may by regulation prescribe.

(c) The printed statements and other materials shall be supplied by the director to each employer without cost to the employer.

History. Acts 1941, No. 391, § 6; A.S.A. 1947, § 81-1107.

CASE NOTES

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Duvall v. Daniels*, 1 Ark. App. 50, 613 S.W.2d 116 (1981); *Massey v. Barnes*, 1 Ark. App. 329, 615 S.W.2d 398 (1981); *Taylor v. Everett*, 2 Ark. App. 181, 617 S.W.2d 864 (1981); *Rogers v. Daniels*, 2 Ark. App. 312,

621 S.W.2d 227 (1981); *Terry v. Director of Labor*, 3 Ark. App. 197, 623 S.W.2d 857 (1981); *Hamby v. Everett*, 4 Ark. App. 52, 627 S.W.2d 266 (1982); *Osterhout v. Everett*, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); *Woodus v. Everett*, 8 Ark. App. 111, 648 S.W.2d 528 (1983); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Jacks v. Stiles*, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

11-10-521. Claims — Filing — Notice to last employer.

(a) Claims for benefits shall be made in accordance with regulations the Director of the Department of Workforce Services prescribes.

(b)(1)(A) A notice of the filing of an initial claim shall be immediately mailed or posted online under subsection (c) of this section, or both, to the employing unit known to the claimant as his or her last employer.

(B) An employer notified under subdivision (b)(1)(A) of this section may choose to receive and respond to notice under this section through the mail or through the online program under subsection (c) of this section, or both.

(2)(A) If a last employer fails to respond within ten (10) calendar days to a notice under this section, the last employer shall be deemed to have waived the right to respond.

(B) If a last employer's right to respond has been deemed waived under subdivision (b)(2)(A) of this section, the director may accept the statement given by the claimant as his or her reason for separation from the last employer and may base his or her determination on the statement given by the claimant.

(c) On or before January 1, 2012, the director shall make available on the website of the Department of Workforce Services a program that will allow employers the option to receive and respond to notice under this section.

History. Acts 1941, No. 391, § 6; 1953, No. 162, § 4; A.S.A. 1947, § 81-1107; Acts 2011, No. 1229, § 2.

Amendments. The 2011 amendment substituted "Department of Workforce Services" for "Arkansas Employment Se-

curity Department" in (a); in (b)(1)(A), deleted "In accordance with such regulations as the director may prescribe" at the beginning and inserted "or posted online under subsection (c) of this section, or both"; and added "(b)(1)(B), (b)(2), and (c).

CASE NOTES

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263

Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); Du-

vall v. Daniels, 1 Ark. App. 50, 613 S.W.2d 116 (1981); Massey v. Barnes, 1 Ark. App. 329, 615 S.W.2d 398 (1981); Taylor v. Everett, 2 Ark. App. 181, 617 S.W.2d 864 (1981); Rogers v. Daniels, 2 Ark. App. 312, 621 S.W.2d 227 (1981); Terry v. Director of Labor, 3 Ark. App. 197, 623 S.W.2d 857 (1981); Hamby v. Everett, 4 Ark. App. 52, 627 S.W.2d 266 (1982); Osterhout v. Ever-

ett, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); Woodus v. Everett, 8 Ark. App. 111, 648 S.W.2d 528 (1983); Hirschy v. Everett, 8 Ark. App. 174, 649 S.W.2d 412 (1983); Linscott v. Director of Labor, 9 Ark. App. 103, 653 S.W.2d 150 (1983); Jacks v. Stiles, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

11-10-522. Claims — Determination.

(a) IN GENERAL.

(1)(A) A monetary determination upon a claim filed pursuant to § 11-10-521(a) shall be made promptly by the Director of the Department of Workforce Services and shall include total wage credits as reported paid by each employer during the claimant's base period and the identity of each base-period employer.

(B)(i) For a claimant who meets the wage requirements of § 11-10-507(5), this notice shall include the beginning date of his or her benefit year, his or her basic weekly benefit amount, and the maximum amount of benefits that may be paid to him or her during the benefit year.

(ii) For a claimant who does not meet the wage requirements of § 11-10-507(5), the notice of monetary determination shall include the reason for such determination.

(2) A nonmonetary determination of a claimant's right to waiting period credit or benefits shall be made under §§ 11-10-507 — 11-10-519 promptly upon his or her timely claiming such credit or benefits.

(b) COMBINATION OF CLAIM. Whenever any claim involves the same issue for more than one (1) claimant, the cases will be combined for the purpose of a hearing if a request to do so is received. If the request is made by any interested party, the director shall refer those cases to a hearing examiner designated by the Board of Review.

(c) FINALITY. The decision shall include the reason for any denial and shall be deemed to be final unless within twenty (20) days after the mailing of notice to an interested party's last known address, or in the absence of mailing, within twenty (20) days after the delivery of notice, an appeal is filed with the board or notice is entered by that body.

(d) NOTICE OF DETERMINATIONS.

(1)(A) Notice of any monetary determination upon an initial claim shall be promptly given to the claimant, by delivery or by mailing the notice to his or her last known address.

(B) A notice of the filing of an initial claim, together with a request for pertinent information concerning claimant's status, shall be promptly mailed to each employer in the base period other than the employer known to the claimant as his or her last employer if the charges to the base-period employer could be affected by benefits paid.

(2)(A) Notice of a nonmonetary determination made pursuant to subdivision (a)(2) of this section shall be promptly given to the

claimant by delivery or by mailing the notice to his or her last known address.

(B) Effective January 1, 1998, a notice of this nonmonetary determination shall be promptly mailed to the last employer.

(e)(1) **MONETARY REDETERMINATIONS.** The director may reconsider a monetary determination when he or she finds that an error in computation or identity has occurred in connection therewith or that base-period wage credits for the claimant had not been used in the original monetary determination.

(2) No reconsideration may be made after one (1) year from the date of the original monetary determination.

(3) If the amount of benefits is increased upon the reconsideration, an appeal solely with respect to the matters involved in the increase may be filed in the manner and subject to the limitations provided in §§ 11-10-523 — 11-10-530.

(4) If the amount of benefits is decreased upon the reconsideration, the matters involved in the decrease shall be subject to review in connection with an appeal by claimant from any determination upon a subsequent claim for benefits that may be affected in amount or duration by the reconsideration.

(5) In the event that an appeal involving an original monetary determination is pending as of the date that a redetermination is issued, the appeal, unless withdrawn, shall be treated as an appeal from such redetermination.

(6) Written notice of a monetary redetermination shall be given in the same manner and to the same parties as provided in subdivision (d)(1) of this section.

(f) **NONMONETARY REDETERMINATIONS.**

(1)(A) Upon receipt of new evidence, the director may reconsider a nonmonetary determination within three (3) years from the date of the original monetary determination.

(B) However, if benefits have been awarded or denied on the basis of a misrepresentation of a material fact, the director may reconsider the nonmonetary determination within one (1) year of the date that the misrepresentation became known to him or her.

(2) In the event that an appeal involving an original nonmonetary determination is pending as of the date that a redetermination is issued, the appeal, unless withdrawn, shall be treated as an appeal from such redetermination.

(3) Written notice of a nonmonetary redetermination shall be given in the same manner and to the same parties as provided in subdivision (d)(2) of this section.

History. Acts 1941, No. 391, § 6; 1943, No. 138, §§ 1, 2; 1949, No. 155, §§ 6, 7; 1953, No. 162, §§ 4-6; 1963, No. 93, § 7; 1971, No. 35, § 10; 1973, No. 329, § 9; 1975, No. 609, § 3; 1977, No. 366, § 8; 1983, No. 482, § 37; A.S.A. 1947, § 81-1107; Acts 1991, No. 100, § 29; 1997, No. 234, § 14; 2005, No. 902, § 6; 2007, No. 490, § 7; 2009, No. 653, § 5.

RESEARCH REFERENCES

Ark. L. Rev. Rules of Evidence in Administrative Proceedings, 15 Ark. L. Rev. 138.

CASE NOTES

ANALYSIS

Determinations.

Notice.

Overpayment.

Determinations.

Both monetary and nonmonetary determinations must be made in the first instance in order to avoid piecemeal litigation of claims. *Davis v. Stiles*, 287 Ark. 261, 700 S.W.2d 369 (1985).

Although subdivisions (a)(1) and (2) divide the monetary and nonmonetary determinations into separate findings, they do not require bifurcated proceedings on each issue. *Davis v. Stiles*, 287 Ark. 261, 700 S.W.2d 369 (1985).

The fact that the monetary and nonmonetary determinations are separate findings under this section does not lead to the conclusion that the Employment Security Division can secure a finding of monetary ineligibility, stop the proceedings at that point while the claimant appeals, and then upon a reversal challenge eligibility of the claimant on other grounds, forcing a second appeal by the claimant; the claimant's appeal should be able to encompass all challenges the first time. *Davis v. Stiles*, 287 Ark. 261, 700 S.W.2d 369 (1985).

The nonmonetary determination must at least be unmistakably reserved in the original determination, but this does not allow the Employment Security Division to make a practice of routinely stating for the record that the determination is reserved until the monetary eligibility is settled on appeal; such a reservation must be in good faith and for an unavoidable reason which can be demonstrated at the time of the reservation. *Davis v. Stiles*, 287 Ark. 261, 700 S.W.2d 369 (1985).

Notice.

Employer who was notified by employment office that former employee had been denied benefits, since she had voluntarily quit employment, was entitled to

notice from employment office when it decided to pay benefits to employee as result of redetermination. *Call v. Luten*, 219 Ark. 640, 244 S.W.2d 130 (1951).

Employer is entitled to notice of commissioner's determination that period of disqualification of employee has passed so that employee may resort to administrative remedies regardless as to whether employer has a meritorious defense. *Cash v. Rocket Mfg. Co.*, 223 Ark. 561, 267 S.W.2d 318 (1954).

Where a nonresident unemployment compensation claimant did not receive notice of her benefits hearing until after the date scheduled for her hearing, the claimant was not given a reasonable opportunity to present her testimony or evidence, and since it appeared from the record that this was not due to any fault on claimant's part, due process required that the proceeding be remanded for a hearing. *Roberts v. Everett*, 8 Ark. App. 49, 648 S.W.2d 504 (1983).

Overpayment.

Where the evidence showed that claimant was without fault in being overpaid in unemployment benefits and that he was financially troubled, claimant was not required to repay the money and the disputed amount could not be deducted from future benefits. *Giles v. Director of Labor*, 2 Ark. App. 301, 621 S.W.2d 10 (1981).

Pursuant to the evidence, the agency was estopped to recover overpayment to claimant. *Wells v. Everett*, 5 Ark. App. 303, 635 S.W.2d 294 (1982).

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Duvall v. Daniels*, 1 Ark. App. 50, 613 S.W.2d 116 (1981); *Massey v. Barnes*, 1 Ark. App. 329, 615 S.W.2d 398 (1981); *Taylor v. Ev-*

erett, 2 Ark. App. 181, 617 S.W.2d 864 (1981); Rogers v. Daniels, 2 Ark. App. 312, 621 S.W.2d 227 (1981); Terry v. Director of Labor, 3 Ark. App. 197, 623 S.W.2d 857 (1981); Hamby v. Everett, 4 Ark. App. 52, 627 S.W.2d 266 (1982); Osterhout v. Everett, 6 Ark. App. 216, 639 S.W.2d 539, 36

A.L.R.4th 392 (1982); Woodus v. Everett, 8 Ark. App. 111, 648 S.W.2d 528 (1983); Hirschy v. Everett, 8 Ark. App. 174, 649 S.W.2d 412 (1983); Linscott v. Director of Labor, 9 Ark. App. 103, 653 S.W.2d 150 (1983); Jacks v. Stiles, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

11-10-523. Board of Review created — Administrative appeal — Claims.

(a)(1) There is created a Board of Review which shall consist of three (3) members.

(2) The members of the board shall be appointed by the Governor for a term of office of four (4) years or until their successors are appointed and qualified. The four-year terms are to run concurrently with the term of the office of the Governor.

(3) A member of the board may be removed by the Governor for cause after hearing.

(4) Vacancies shall be filled by appointment by the Governor for the unexpired term.

(b)(1) The Governor shall designate as Chair of the Board of Review the member selected to represent the public at large.

(2) The chair shall be paid a full-time salary and devote all of his or her time to his or her duties herein prescribed.

(3) The chair shall have a four-year term beginning with the year 2003 appointment.

(c)(1)(A) The other two (2) members of the board are to serve when requested to serve by the chair of the board at his or her own discretion.

(B) If any interested party requests in writing a review by the full board, then the chair shall direct board members to attend and review the matters as requested by the petitioner.

(2) The members of the board other than the chair may receive expense reimbursement and stipends to be paid from the Employment Security Administration Fund in accordance with § 25-16-901 et seq.

(d) The chair shall appoint some competent person as an examiner and reporter for the board. That person shall have authority under the direction of the chair of the board to:

(1) Hold hearings on appeals and take testimony and submit it to the chair with recommendations, which question shall be determined by the chair. The person, when holding hearings under the direction of the chair, shall have the same authority as the chair or members of the board, except that he or she shall not have the authority to render any decision therein;

(2) Take and transcribe all testimony taken either before the examiner, the chair, or the board; and

(3) Act as secretary for the board.

(e)(1) The members of the board shall be selected as follows:

(A) One (1) member shall be, because of his or her vocation, occupation, or affiliation, deemed to be representative of employers;

(B) One (1) member shall be, because of his or her vocation, occupation, or affiliation, deemed to be representative of employees; and

(C) The chair shall be a licensed practicing attorney who, because of his or her vocation, occupation, or affiliation, is deemed not to be representative of employers or employees.

(2) All members shall be selected without regard to § 11-10-310.

(3) The examiner and reporter shall be selected in accordance with the merit system provided for in § 11-10-310.

(f) The chair, the members, and the examiner and reporter, as provided for above, shall all receive their actual and necessary expenses incurred, in accordance with the regulations of the Department of Workforce Services.

(g)(1)(A) To hear and decide appeal claims, the board created by this section shall appoint one (1) or more impartial appeal tribunals.

(B) Each tribunal shall consist of either a hearing officer selected in accordance with § 11-10-310 or a body consisting of three (3) members, one (1) of whom shall be a representative of employers and the other of whom shall be a representative of employees.

(C) Each of the latter two (2) members may be selected without regard to § 11-10-310, shall serve at the pleasure of the board, and may be paid a fee of not more than twenty-five dollars (\$25.00) per day of active service on such tribunal plus necessary expenses and shall be paid from the Employment Security Administration Fund.

(2)(A) The board shall designate alternates to serve in the absence or disqualification of any member of an appeal tribunal.

(B) The chair shall act alone in the absence or disqualification of any other member or his or her alternates. In no case shall the hearing proceed unless the chair of the appeal tribunal is present.

(C) The Director of the Department of Workforce Services shall provide the board and appeal tribunals with proper facilities and assistance for the execution of their functions.

(D) The appeal hearing officer, as such, shall have all power bestowed on him or her as chair of the appeals tribunal.

History. Acts 1941, No. 391, § 6; 1943, No. 138, § 3; 1943, No. 263, § 2; 1947, No. 398, § 5; 1953, No. 162, § 7; 1975, No. 609, § 4; 1985, No. 8, § 7; 1985, No. 9, § 7; A.S.A. 1947, § 81-1107; Acts 1991, No. 100, §§ 30, 31; 1995, No. 519, § 6; 1997, No. 234, § 15; 1997, No. 250, § 61; 2001, No. 1467, §§ 3-6.

A.C.R.C. Notes. Pursuant to § 1-2-207, this section is set out above as amended by Acts 1997, No. 250. Subdivision (c)(2) of this section was also

amended by Acts 1997, No. 234 to read as follows: “(c)(2) The members of the board other than the chairman shall be paid in accordance with Section 25-16-905 when attending meetings in connection with their duties as members and shall be reimbursed for any travel or other expense incurred in accordance with the travel regulations applicable to the employees of the Arkansas Employment Security Department.”

Cross References. Employment Secu-

city Administration Fund, § 11-10-320.
Compensation of State Boards, § 25-16-901 et seq.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2001 Arkansas General Assembly, Labor Law, 24 U. Ark. Little Rock L. Rev. 493.

CASE NOTES

Hearing Appeals Referee.

Considering both the adjudicative nature of the functions performed by the defendant hearings appeals referee in his position with the Arkansas Employment Security Department as well as the safeguards against unconstitutional or otherwise improper conduct that are built into the structure of the division's adjudicatory system, the defendant referee is absolutely immune from liability for damages based on actions taken in connection with his duties. Jones v. Singer Career Sys., 584 F. Supp. 1253 (E.D. Ark. 1984).

Cited: Andrews v. Victor Metal Prods. Corp., 241 Ark. 889, 411 S.W.2d 515 (1967); Garrett v. Cline, 257 Ark. 829, 520 S.W.2d 281 (1975); Harris v. Daniels, 263 Ark. 897, 567 S.W.2d 954 (1978); Bradshaw v. Daniels, 268 Ark. 716, 595 S.W.2d

254 (Ct. App. 1980); Hodnett v. Daniels, 271 Ark. 479, 609 S.W.2d 122 (1980); Duvall v. Daniels, 1 Ark. App. 50, 613 S.W.2d 116 (1981); Massey v. Barnes, 1 Ark. App. 329, 615 S.W.2d 398 (1981); Taylor v. Everett, 2 Ark. App. 181, 617 S.W.2d 864 (1981); Rogers v. Daniels, 2 Ark. App. 312, 621 S.W.2d 227 (1981); Terry v. Director of Labor, 3 Ark. App. 197, 623 S.W.2d 857 (1981); Hamby v. Everett, 4 Ark. App. 52, 627 S.W.2d 266 (1982); Osterhout v. Everett, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); Woodus v. Everett, 8 Ark. App. 111, 648 S.W.2d 528 (1983); Hirschy v. Everett, 8 Ark. App. 174, 649 S.W.2d 412 (1983); Linscott v. Director of Labor, 9 Ark. App. 103, 653 S.W.2d 150 (1983); Jacks v. Stiles, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

11-10-524. Claims — Administrative appeal — Filing and hearing.

(a)(1) The claimant, the Director of the Department of Workforce Services, or any other party entitled to notice may appeal a determination made by the agency by filing a written notice of appeal with the appeal tribunal or at any office of the Department of Workforce Services within twenty (20) calendar days after the date of mailing the notice to his or her last known address, or if the notice is not mailed, within twenty (20) calendar days after the date of delivery of the notice. If mailed, an appeal shall be considered to have been filed as of the date of the postmark on the envelope.

(2) However, if it is determined by the appeal tribunal or the Board of Review of the department that the appeal is not perfected within the twenty-calendar-day period as a result of circumstances beyond the appellant's control, the appeal may be considered as having been filed timely.

(b)(1) Unless the appeal is withdrawn with its permission or is removed to the board, the appeal tribunal, after affording the parties a reasonable opportunity for a fair hearing, and on the basis of the record, shall affirm, modify, reverse, dismiss, or remand the determination.

(2) However, whenever an appeal involves a question as to whether services were performed by a claimant in employment or for an employing unit, the appeal tribunal shall give special notice of the issue and of the pendency of the appeal to the employing unit and to the director, both of whom shall be parties to the proceedings and be afforded a reasonable opportunity to present evidence bearing on the question in issue.

(3) The appeal tribunal shall grant upon request from any interested party in an intrastate claim an in-person hearing.

(c)(1) The parties shall be promptly notified of the tribunal's decision and shall be furnished a copy of the decision and the findings and conclusions in support thereof.

(2) The decision shall become final unless within twenty (20) calendar days after the date of mailing the notice to the parties' last known addresses an appeal is initiated pursuant to § 11-10-525 or a request for reopening is made pursuant to subsection (d) of this section.

(d)(1) If any party fails to appear at the initial tribunal hearing scheduled as a result of an appeal, that party may request that the matter be reopened by the tribunal.

(2) Requests for reopening shall be made in writing and shall be granted by the tribunal only upon a showing of good cause for failing to appear at the initial tribunal hearing.

(3)(A)(i) If a request for reopening is granted, the tribunal shall schedule another hearing, after which it will issue a new decision.

(ii) If a request for reopening is not granted, the tribunal's initial decision shall stand as issued.

(B)(i) In either event, the parties shall be promptly notified of the tribunal's decision and shall be furnished a copy of the decision and the findings and conclusions in support thereof.

(ii) The decision shall become final unless within twenty (20) calendar days after the date of its mailing to the parties' last known addresses an appeal is initiated pursuant to § 11-10-525.

History. Acts 1941, No. 391, § 6; 1943, No. 138, § 4; 1953, No. 162, § 6; 1975, No. 609, § 5; 1983, No. 482, §§ 22, 37, 38; A.S.A. 1947, § 81-1107; Acts 1991, No. 48, § 5; 1991, No. 100, § 32; 1993, No. 6, § 9; 1997, No. 234, §§ 16-18; 2003, No. 1223, §§ 8, 9; 2009, No. 802, § 6.

A.C.R.C. Notes. Prior to the 2003

amendment, this section contained a subdivision (d)(1)(B), which read, "No other request for reopening shall be considered by the tribunal." Subdivision (d)(1)(B) was neither set out nor specifically deleted in the 2003 amendment. Subdivision (d)(1)(A) has been renumbered as (d)(1) in order to conform with Code style.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General As-

sembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS

Applicability.

Appearance.

Evidence.

Failure to Appeal.

National Labor Relations Board Decision.

Timeliness of Appeal.

Applicability.

Subsection (c) does not apply to appellate review before the Board of Review; at that stage, there is no statutory provision for reopening a decision, but only a provision for judicial review. *Arkansas Emp. Sec. Dep't v. Mellon*, 322 Ark. 715, 910 S.W.2d 699 (1995).

Subsection (d) gives the Appeal Tribunal the authority to reopen a case only if the party that filed the appeal fails to appear at the initial tribunal hearing and subsequently shows good cause as to why the party did not appear; because claimant for unemployment benefits was not the party who filed an appeal, the Appeal Tribunal had no authority to entertain her request to reopen the case; further, the record failed to show that claimant ever petitioned the Appeal Tribunal, but rather, she appealed the denial of benefits to the Arkansas Board of Review. *Williams v. Director*, 79 Ark. App. 407, 88 S.W.3d 427 (2002).

Subsection (c) provides that the Arkansas Appeal Tribunal may reopen a decision upon a showing of good cause, however, that procedure does not apply to the next tier of appellate review before the Arkansas Board of Review; at that stage, there is no statutory provision for reopening a decision, only a provision for judicial review. *Allen v. Dir., Empl. Sec. Dep't.*, 84 Ark. App. 239, 139 S.W.3d 138 (2003).

Appearance.

There is no requirement that a claimant make a personal appearance at hearing to have his reasons for contesting a decision denying benefits made part of the record and considered by the appeals tribunal. *Stewart v. Daniels*, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980).

Board of review did not err in finding that the employer was not entitled to have the case reopened because subdivision (d)(1) of this section clearly stated that a

party could request a reopening if it failed to appear at initial tribunal hearing, and, the employer did not fail to appear at the initial tribunal hearing; rather, the employer appeared but then declined to participate. *S. Ark. Developmental Ctr. for Children And Families v. Dep't of Workforce Servs.*, 99 Ark. App. 260, 258 S.W.3d 803 (2007).

Evidence.

Although the Board of Review and Appeals Tribunal may consider a claimant's initial statement to the local employment security agency as some evidence either in support of the claim or in opposition to it, such a statement alone cannot serve as substantial evidence in support of the claim. *J.P. Price Lumber Co. v. Daniels*, 270 Ark. 297, 604 S.W.2d 579 (1980).

Failure to Appeal.

Where claimant did not appeal from determination that he was liable for repayment of overpaid benefits, he could not later demand hearing on determination that subsequent benefits would be withheld until overpayment was recovered. *Johnson v. Director of Labor*, 10 Ark. App. 24, 661 S.W.2d 401 (1983).

National Labor Relations Board Decision.

Appeals tribunal and Board of Review may or may not agree with decision of National Labor Relations Board. *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950).

Timeliness of Appeal.

Under this section, the appeals tribunal and the Board of Review were required to consider whether unemployment compensation claimant's receipt of notice of denial more than the permitted time limit after it was mailed was such a circumstance beyond his control as to permit a late appeal. *Battle v. Daniels*, 260 Ark. 683, 543 S.W.2d 477 (1976).

Where a claimant was given no opportunity before the Board of Review to attempt to explain the lateness of her appeal to that body, and where there was no substantial evidence in the record to support the finding of the board that the failure to file a timely appeal was not a result of circumstances beyond her con-

trol, due process required that claimant be afforded a hearing on her contentions. *Paulino v. Daniels*, 269 Ark. 676, 599 S.W.2d 760 (Ct. App. 1980).

Claimant's argument that her appeal was untimely because of concentrated effort to secure employment was not an acceptable defense. *Nichols v. Stiles*, 11 Ark. App. 212, 668 S.W.2d 554 (1984).

Claimant's reliance upon her attorney did not excuse her failure to file a timely appeal because the client is bound by the acts of his attorney within the scope of the latter's authority, including the attorney's negligent failure to file proper pleadings. *Springdale Mem. Hosp. v. Director of Labor*, 34 Ark. App. 266, 809 S.W.2d 828 (1991).

The Board of Review erred in determining that an appeal by the employer from a decision in favor of an unemployment compensation claimant was timely where the appeal was postmarked 89 days after the date the decision was mailed and the only evidence presented was that the employer's representative prepared the notice of appeal in a timely manner; the envelope containing the notice of appeal was at all times in the control of the employer, but timely delivery to the post office was not proven, and, therefore, the decision of the board could not be sustained. *Bennett v. Director of Emp. Sec.* Dep't, 73 Ark. App. 281, 42 S.W.3d 588 (2001).

Arkansas Board of Review erred in dismissing an employee's appeal of an order denying a claim for unemployment benefits because the decision denying the

claim was not mailed to the address that the employee provided to the hearing officer; hence, the 20-day period in which to file a timely appeal had not begun to run, and the appeal was not untimely filed under subdivision (a)(1) of this section. *Sigel v. Dir., Dep't of Workforce Servs.*, 2012 Ark. App. 213, — S.W.3d — (2012).

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Duvall v. Daniels*, 1 Ark. App. 50, 613 S.W.2d 116 (1981); *Massey v. Barnes*, 1 Ark. App. 329, 615 S.W.2d 398 (1981); *Taylor v. Everett*, 2 Ark. App. 181, 617 S.W.2d 864 (1981); *Rogers v. Daniels*, 2 Ark. App. 312, 621 S.W.2d 227 (1981); *Terry v. Director of Labor*, 3 Ark. App. 197, 623 S.W.2d 857 (1981); *Hamby v. Everett*, 4 Ark. App. 52, 627 S.W.2d 266 (1982); *Osterhout v. Everett*, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); *Woodus v. Everett*, 8 Ark. App. 111, 648 S.W.2d 528 (1983); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Jacks v. Stiles*, 19 Ark. App. 129, 717 S.W.2d 828 (1986); *Lawson v. Brooks*, 29 Ark. App. 14, 779 S.W.2d 185 (1989); *Crockett v. Counseling Servs. of E. Ark., Inc.*, 85 Ark. App. 371, 154 S.W.3d 278 (2004); *Price v. Dir., Dep't of Workforce Servs.*, 2011 Ark. App. 100, — S.W.3d — (2011).

11-10-525. Claims — Administrative appeal — Review by Board of Review.

(a) An appeal filed by any party shall be allowed as of right if the determination was not affirmed by the appeal tribunal.

(b) The Board of Review, on its own motion and within the time specified in § 11-10-524, may initiate a review of the decision of an appeal tribunal or determination of a special examiner or may allow an appeal from the decision on application filed within the time by any party entitled to notice of the decision.

(c)(1) Upon review on its own motion or upon appeal and on the basis of evidence previously submitted in the case, or upon the basis of any additional evidence as it may direct be taken, the board may affirm, modify, reverse, dismiss, or remand the case.

(2) In cases where the board directs that additional evidence be taken in an appeal involving an intrastate claim, an in-person hearing shall be granted if requested by any interested party.

(d) The board shall promptly notify the parties to any proceeding before it of its decision, including its findings and conclusions in support of the decision.

(e) The decision shall be final unless within thirty (30) calendar days after the mailing of notice thereof to the parties' last known address or in the absence of the mailing, within thirty (30) calendar days after the delivery of the notice, a proceeding for judicial review is initiated pursuant to § 11-10-529.

(f) However, upon denial by the board of an application for appeal from the decision of an appeal tribunal, the decision of the appeal tribunal shall be deemed to be a decision of the board within the meaning of this section for purposes of judicial review and shall be subject to judicial review within the time and in the manner provided for with respect to decisions of the board, except that the time for initiating the review shall run from the date of notice of the order of the board denying the application for appeal.

History. Acts 1941, No. 391, § 6; 1943, No. 138, § 5; 1953, No. 162, § 9; 1983, No. 482, § 23; A.S.A. 1947, § 81-1107; Acts 1999, No. 1116, § 12; 2003, No. 1223, § 10; 2007, No. 490, § 8; 2009, No. 802, § 7.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General Assembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS

Appearance.
Evidence.
—Previously Submitted.
False Statement of Fact.
National Labor Relations Board Decision.
Remand to Board.
—Overpayment.

Appearance.

Where an employer was not present at Board of Review hearing where the claimant presented his case and the previous denial of benefits was overturned, and the employer contended that its absence was due to lack of notice, the matter was remanded to determine whether the employer had received notice. *Helena-West Helena Sch. Dist. v. Stiles*, 15 Ark. App. 30, 688 S.W.2d 326 (1985).

Evidence.

Evidence sufficient to support the Board of Review's finding that employees' unemployment was because of a labor dispute in which they participated as active union members. *Tosh v. A.T.I., Inc.*, 259 Ark. 228, 534 S.W.2d 242 (1976).

Although the Board of Review and appeals tribunal may consider a claimant's initial statement to the local employment security agency as some evidence either in support of the claim or in opposition to it, such a statement alone cannot serve as substantial evidence in support of the claim. *J.P. Price Lumber Co. v. Daniels*, 270 Ark. 297, 604 S.W.2d 579 (1980).

Under subdivision (a)(2), the board has discretion to direct that additional evidence be taken, but it is not required to do so as long as each side has notice and opportunity to rebut the evidence of the

other party. *Rogers v. Director of Labor*, 27 Ark. App. 128, 767 S.W.2d 319 (1989); *Arkansas Game & Fish Comm'n v. Director of Labor*, 36 Ark. App. 243, 821 S.W.2d 69 (1992).

—Previously Submitted.

Previously submitted means evidence submitted in some previous hearing at which either party would have an opportunity to question or support it. *Jordan v. Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ct. App. 1980).

Where Board of Review reversed referee's decision denying benefits on the basis of a statement of claimant's coemployee which had not been presented to the referee and which was sent to the board without its solicitation and without notice to the employer, there was a failure to comply with this section which does not permit the board to consider evidence of which a party has not been apprised. *Jordan v. Dukes*, 269 Ark. 581, 600 S.W.2d 21 (Ct. App. 1980).

It was improper for the Board of Review to accept and consider a letter submitted unilaterally by the employer's safety coordinator, without notice to the claimant employee, furnishing information not presented at the appeal tribunal hearing, since the consideration violates the procedures set forth in this section and § 11-10-526. *Brewer v. Everett*, 3 Ark. App. 59, 621 S.W.2d 883 (1981).

The Board of Review is without jurisdiction to accept additional evidence in appeals pending before it; accordingly where, in reversing an award of benefits on grounds of misconduct, the board in its findings referred to statements submitted by the employer for the first time on appeal, it must be assumed that the board based its decision upon the new evidence and the decision must be reversed. *Ramsey v. Everett*, 7 Ark. App. 120, 644 S.W.2d 621 (1983).

Where the Board of Review considered evidence that was not before the appeal tribunal, and the additional evidence likely was prejudicial to the claimant, the board's decision reversing the appeal tribunal and denying unemployment compensation to the claimant had to be remanded. *Jones v. Director of Labor*, 8 Ark. App. 234, 650 S.W.2d 601 (1983).

Although it is within the discretion of the Board of Review to direct that addi-

tional evidence be taken, nothing in the law requires a second hearing so long as each side has notice of and a fair opportunity to rebut the evidence of the other party. *Maybelline Co. v. Stiles*, 10 Ark. App. 169, 661 S.W.2d 462 (1983).

The Board of Review did not err in refusing to accept any evidence other than that which was previously submitted before the appeal tribunal. *Fry v. Director of Labor*, 16 Ark. App. 204, 698 S.W.2d 816 (1985).

False Statement of Fact.

Inferences, drawn by the Board of Review to the effect that claimant was indeed interested in a job and benefited from it, were permissible under the evidence and claimant was obligated to make that information known when he drew his unemployment insurance; accordingly, the board's finding that claimant was disqualified from receiving benefits because he made a false statement of material fact when filing claim was sustained. *Eden v. Daniels*, 269 Ark. 690, 600 S.W.2d 416 (Ct. App. 1980).

National Labor Relations Board Decision.

Appeals tribunal and Board of Review may or may not agree with decision of National Labor Relations Board. *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950).

Remand to Board.

Where Court of Appeals' order of remand directed the Board of Review to consider certain additional evidence, the Board of Review was correct in holding that at the time of the remand hearing it could make findings only for that evidence. *Reynolds Metals Co. v. Couch*, 12 Ark. App. 267, 675 S.W.2d 838 (1984).

Where the claimant failed to report part-time income on his unemployment compensation claim form, the Board of Review was justified in finding that such failure to report constituted a willful, false statement of a material fact, making the claimant liable for repayment of overpaid benefits under this section; such failure to report was "material," even though the amount of part-time income received by the claimant amounted to less than 40% of his weekly benefit, the amount of income allowed under § 11-10-503 before benefits

will be reduced. *Coy v. Stiles*, 13 Ark. App. 98, 679 S.W.2d 804 (1984).

—Overpayment.

Claimant not required to pay back overpayment. *Whitford v. Daniels*, 263 Ark. 222, 563 S.W.2d 469 (1978).

Claimant required to pay back overpayment. *Vaughn v. Everett*, 5 Ark. App. 149, 633 S.W.2d 401 (1982).

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Duvall v. Daniels*, 1 Ark. App. 50, 613 S.W.2d 116 (1981); *Massey v. Barnes*, 1 Ark. App. 329, 615 S.W.2d 398 (1981); *Taylor v. Everett*, 2 Ark. App. 181, 617 S.W.2d 864

(1981); *Rogers v. Daniels*, 2 Ark. App. 312, 621 S.W.2d 227 (1981); *Terry v. Director of Labor*, 3 Ark. App. 197, 623 S.W.2d 857 (1981); *Hamby v. Everett*, 4 Ark. App. 52, 627 S.W.2d 266 (1982); *Osterhout v. Everett*, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); *Woodus v. Everett*, 8 Ark. App. 111, 648 S.W.2d 528 (1983); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Jacks v. Stiles*, 19 Ark. App. 129, 717 S.W.2d 828 (1986); *Edwards v. Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988); *Springdale Mem. Hosp. v. Director of Labor*, 34 Ark. App. 266, 809 S.W.2d 828 (1991); *Mellon v. Director, Ark. Emp. Sec. Dep't*, 49 Ark. App. 48, 895 S.W.2d 948 (1995); *Arkansas Emp. Sec. Dep't v. Mellon*, 322 Ark. 715, 910 S.W.2d 699 (1995); *Allen v. Dir., Empl. Sec. Dep't.*, 84 Ark. App. 239, 139 S.W.3d 138 (2003).

11-10-526. Claims — Administrative appeal — Procedure.

(a)(1) The Board of Review, appeal tribunal, and special examiners shall not be bound by common law or statutory rules of evidence or by technical rules of procedure, but any hearing or appeal before the tribunals shall be conducted in such manner as to ascertain the substantial rights of the parties.

(2) In like manner as provided at § 11-10-307(a) for the adopting, amending, or rescinding of general rules by the Director of the Department of Workforce Services, the board may adopt reasonable regulations governing the manner of filing appeals, the conduct of hearings, and other appellate procedures, consistent with this chapter.

(b) Hearings on appeals before an appeals tribunal or before the board shall not be held sooner than five (5) days from the date of the mailing of notice thereof to the parties to the appeal.

(c) When the same or substantially similar evidence is relevant and material to the matters in issue in claims by more than one (1) individual or in claims by a single individual with respect to two (2) or more weeks of unemployment, the same time and place for considering each claim may be fixed, hearings jointly conducted, a single record of the proceedings made, and evidence introduced with respect to one (1) proceeding considered as introduced in the others, provided that in the judgment of the examiner or tribunal having jurisdiction of the proceeding, consolidation would not be prejudicial to any party.

(d) No person shall participate on behalf of the director or the board in any case in which he or she has a direct or indirect interest.

(e) A record shall be kept of all testimony and proceedings before special examiners or in connection with an appeal, but the testimony need not be transcribed unless further review is initiated.

(f) Witnesses subpoenaed pursuant to §§ 11-10-520 — 11-10-532 shall be allowed fees at a rate fixed by the director, and fees of witnesses subpoenaed on behalf of the director or any claimant shall be deemed part of the expense of administering this chapter.

History. Acts 1941, No. 391, § 6; 1943, 1947, § 81-1107; Acts 1997, No. 234, § 19; No. 138, § 6; 1983, No. 482, § 24; A.S.A. 2009, No. 802, § 8.

CASE NOTES

ANALYSIS

Appearance.
Burden of Proof.
Due Process.
Evidence.
Formal Rules.
Reversal.
Scope of Review.
Subpoena.

Appearance.

There is no requirement to enter an appearance at a Board of Review hearing or lose by default. *Parker v. Ramada Inn*, 264 Ark. 472, 572 S.W.2d 409 (1978).

There is no requirement that a claimant make a personal appearance at hearing to have his reasons for contesting a decision denying benefits made part of the record and considered by the appeals tribunal. *Stewart v. Daniels*, 269 Ark. 809, 601 S.W.2d 245 (Ct. App. 1980).

The Board of Review's decision in favor of the employee could not be sustained in view of the fact that the employee declined to appear or otherwise present evidence to the appeals tribunal or Board of Review, and the employer presented substantial evidence in support of its position. *J.P. Price Lumber Co. v. Daniels*, 270 Ark. 297, 604 S.W.2d 579 (1980).

Burden of Proof.

Where entire record of hearing before chief appeals referee was before the appeal tribunal on remand, company resisting efforts of claimants to obtain unemployment benefits had the burden to go forward to overcome the prima facie case made by the determination of the examiner. *Little Rock Furn. Mfg. Co. v. Commissioner of Labor*, 227 Ark. 288, 298 S.W.2d 56 (1957).

Where the employee has prevailed upon his claim at the agency level the burden is upon the employer to go forward with

evidence before the appeals tribunal to overcome the prima facie case in favor of the employee created by the agency determination. *J.P. Price Lumber Co. v. Daniels*, 270 Ark. 297, 604 S.W.2d 579 (1980).

Due Process.

Where an unemployment benefits claimant, who was discharged for alleged dishonesty, had no opportunity to subpoena and cross-examine adverse witnesses either at the hearing before the appeals tribunal or at the proceeding before the Board of Review, he was denied due process of law. *Smith v. Everett*, 276 Ark. 430, 637 S.W.2d 537 (1982).

Where the Board of Review's denial of unemployment benefits was based solely on the employer's belated affidavit that the claimant voluntarily quit his job without making reasonable efforts to preserve his job rights, the board's decision had to be reversed and remanded since the claimant was not given an opportunity to confront and cross-examine the employer or other adverse witnesses whose names may have surfaced as the result of the employer's affidavit. *Smith v. Everett*, 6 Ark. App. 337, 642 S.W.2d 320 (1982). But see *Fry v. Director of Labor*, 16 Ark. App. 204, 698 S.W.2d 816 (1985).

Where the notice for an unemployment compensation hearing had stated that the claimant was discharged for alleged misconduct in connection with the work, the claimant introduced evidence to refute that charge, and the appeal tribunal based its qualification decision on the ground that the claimant was guilty of misconduct, the Board of Review denied the claimant his due process rights when, on a further appeal, it injected for the first time the issue that the claimant had voluntarily quit, because the board thereby denied the claimant proper notice of the disputed issue, the opportunity to confront and cross-examine adverse wit-

nesses, and the chance to present rebuttal evidence on the voluntary quit issue. *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983).

Evidence.

Evidence sufficient to support the action of the Board of Review in affirming an overpayment determination. *Lemay v. Daniels*, 269 Ark. 683, 599 S.W.2d 771 (Ct. App. 1980).

Evidence sufficient to affirm an award by the Board of Review. *Willis Johnson Co. v. Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ct. App. 1980).

It was improper for the Board of Review to accept and consider a letter submitted unilaterally by the employer's safety coordinator, without notice to the claimant employee, furnishing information not presented at the appeal tribunal hearing, since such consideration violates the procedures set forth in § 11-10-525 and this section. *Brewer v. Everett*, 3 Ark. App. 59, 621 S.W.2d 883 (1981).

It is prejudicial error for the Board of Review to consider matters submitted to it by one party which were not in evidence before the referee and of which the other party is afforded no notice or opportunity of rebuttal. *Clay v. Everett*, 4 Ark. App. 122, 628 S.W.2d 339 (1982).

It is within Board of Review's discretion to direct that additional evidence be taken. *Carp Constr. v. Stiles*, 23 Ark. App. 24, 740 S.W.2d 632 (1987).

Hearsay evidence can constitute substantial evidence in unemployment compensation cases, but the claimant must be given the opportunity to subpoena and cross-examine adverse witnesses at some stage of the proceedings. When the claimant does not request another hearing in order to cross-examine witnesses whose hearsay statements have been received in evidence, he effectively waives his right of cross-examination, and due process requirements are not violated. *Edwards v. Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988).

Formal Rules.

Although the appeals referee asked a great number of very leading questions, and in some instances came close to putting words in the mouth of the claimant while she was testifying and the Board of Review adopted the findings and decision

of the referee as its own, the actions did not require a reversal since neither the referee nor the Board of Review were bound by the statutory rules of evidence or by the technical rules of procedure. *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980).

The parties before the Board of Review are not required to formally object or proffer evidence to preserve a record for appeal purposes, since such a requirement would impose a duty contrary to that envisioned by the General Assembly when it enacted this section. *Smith v. Everett*, 6 Ark. App. 337, 642 S.W.2d 320 (1982). But see *Fry v. Director of Labor*, 16 Ark. App. 204, 698 S.W.2d 816 (1985).

Neither the appeal tribunal nor the Board of Review is bound by common law or statutory rules of evidence. *Haynes v. Director of Labor*, 19 Ark. App. 71, 719 S.W.2d 437 (1986).

Reversal.

Unless the hearing for unemployment compensation benefits is conducted in such a way as to make it impossible to ascertain the substantial rights of the parties, the Court of Appeals cannot properly reverse on procedure. *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980).

Scope of Review.

Board of Review had power to consider employer's assertions concerning lack of notice of telephone hearing, but where employer did not raise notice question below, it could not be considered on appeal. *Carp Constr. v. Stiles*, 23 Ark. App. 24, 740 S.W.2d 632 (1987).

Subpoena.

Where claimant was denied employment security benefits under this section and appealed to the appeal tribunal, it was error for the referee to refuse to contact her employer to confirm that she was terminated while in the hospital, since the proper procedure would have been to continue the hearing and subpoena the witness. *Ireland v. Daniels*, 2 Ark. App. 44, 616 S.W.2d 33 (1981).

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d

254 (Ct. App. 1980); Hodnett v. Daniels, 271 Ark. 479, 609 S.W.2d 122 (1980); Duvall v. Daniels, 1 Ark. App. 50, 613 S.W.2d 116 (1981); Massey v. Barnes, 1 Ark. App. 329, 615 S.W.2d 398 (1981); Taylor v. Everett, 2 Ark. App. 181, 617 S.W.2d 864 (1981); Rogers v. Daniels, 2 Ark. App. 312, 621 S.W.2d 227 (1981); Terry v. Director of Labor, 3 Ark. App. 197, 623 S.W.2d 857 (1981); Hamby v. Everett, 4 Ark. App. 52,

627 S.W.2d 266 (1982); Osterhout v. Everett, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); Woodus v. Everett, 8 Ark. App. 111, 648 S.W.2d 528 (1983); Hirschy v. Everett, 8 Ark. App. 174, 649 S.W.2d 412 (1983); Linscott v. Director of Labor, 9 Ark. App. 103, 653 S.W.2d 150 (1983); Jacks v. Stiles, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

11-10-527. Claims — Conclusiveness of determinations and decisions.

(a) Except insofar as reconsideration of any determination is had under the provisions of § 11-10-522, any right, fact, or matter in issue, directly passed upon or necessarily involved in a determination or redetermination that has become final, or in a decision on appeal under §§ 11-10-523 — 11-10-530 that has become final, shall be conclusive for all the purposes of this chapter as between the Director of the Department of Workforce Services, the claimant, and all employing units who had notice of the determination, redetermination, or decision.

(b) Subject to appeal proceedings and judicial review as provided in §§ 11-10-520 — 11-10-532, any determination, redetermination, or decision as to rights to benefits shall be conclusive for all the purposes of this chapter and shall not be subject to collateral attack by any employing unit, irrespective of notice.

History. Acts 1941, No. 391, § 6; A.S.A. 1947, § 81-1107.

CASE NOTES

Cited: Andrews v. Victor Metal Prods. Corp., 241 Ark. 889, 411 S.W.2d 515 (1967); Garrett v. Cline, 257 Ark. 829, 520 S.W.2d 281 (1975); Harris v. Daniels, 263 Ark. 897, 567 S.W.2d 954 (1978); Bradshaw v. Daniels, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); Hodnett v. Daniels, 271 Ark. 479, 609 S.W.2d 122 (1980); Duvall v. Daniels, 1 Ark. App. 50, 613 S.W.2d 116 (1981); Massey v. Barnes, 1 Ark. App. 329, 615 S.W.2d 398 (1981); Taylor v. Everett, 2 Ark. App. 181, 617 S.W.2d 864 (1981); Rogers v. Daniels, 2 Ark. App. 312,

621 S.W.2d 227 (1981); Terry v. Director of Labor, 3 Ark. App. 197, 623 S.W.2d 857 (1981); Hamby v. Everett, 4 Ark. App. 52, 627 S.W.2d 266 (1982); Osterhout v. Everett, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); Woodus v. Everett, 8 Ark. App. 111, 648 S.W.2d 528 (1983); Hirschy v. Everett, 8 Ark. App. 174, 649 S.W.2d 412 (1983); Linscott v. Director of Labor, 9 Ark. App. 103, 653 S.W.2d 150 (1983); Jacks v. Stiles, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

11-10-528. Claims — Administrative appeal — Rule of decision.

(a) The final decisions of the Board of Review or of an appeal tribunal, and the principles of law declared by it in arriving at the decisions, unless expressly or impliedly overruled by a later decision of the board or by a court of competent jurisdiction, shall be binding upon the Director of the Department of Workforce Services and any examiner

or appeal tribunal in subsequent proceedings which involve similar questions of law.

(b)(1) However, if in connection with any subsequent proceeding, the director, an examiner, or appeal tribunal has serious doubt as to the correctness of any principle so declared, then they may certify their findings of fact in the case, together with the question of law involved, to the board.

(2) After giving notice and reasonable opportunity for hearing upon the law to all parties to the proceedings, the board shall certify to the director, the examiner, or appeal tribunal and the parties its answer to the question submitted.

(c) If the question thus certified to the board arises in connection with a claim for benefits, the board in its discretion may remove to itself the entire proceedings on the claim. After proceeding in accordance with the requirements of §§ 11-10-523 — 11-10-530 with respect to proceedings before an appeal tribunal, the board shall render its decision upon the entire claim.

(d) Any decision made under this section after removal of the proceeding upon a claim to the board shall have the effect of a decision under § 11-10-525 and shall be subject to judicial review within the same time and to the same extent.

History. Acts 1941, No. 391, § 6; 1943, No. 138, § 7; A.S.A. 1947, § 81-1107.

CASE NOTES

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Duvall v. Daniels*, 1 Ark. App. 50, 613 S.W.2d 116 (1981); *Massey v. Barnes*, 1 Ark. App. 329, 615 S.W.2d 398 (1981); *Taylor v. Everett*, 2 Ark. App. 181, 617 S.W.2d 864 (1981); *Rogers v. Daniels*, 2 Ark. App. 312,

621 S.W.2d 227 (1981); *Terry v. Director of Labor*, 3 Ark. App. 197, 623 S.W.2d 857 (1981); *Hamby v. Everett*, 4 Ark. App. 52, 627 S.W.2d 266 (1982); *Osterhout v. Everett*, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); *Woodus v. Everett*, 8 Ark. App. 111, 648 S.W.2d 528 (1983); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Jacks v. Stiles*, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

11-10-529. Claims — Decision of Board of Review — Judicial review.

(a)(1)(A) Any party entitled to a decision of the Board of Review shall have thirty (30) calendar days from the date the decision is mailed to his or her last known address in which to request a judicial review by filing in the Court of Appeals a petition for review of the decision, and in the proceedings any other party to the proceeding before the board shall be made a party respondent.

(B)(i) If mailed, a petition for review shall be considered filed as of the date of the postmark on the envelope.

(ii) In the event of a nonexistent or illegible postmark, the office of the Clerk of the Court of Appeals shall notify the appellant by mail; and

(iii) The appellant shall then have ten (10) calendar days from the posted mailing date of the clerk's notification letter to provide the Court of Appeals proof of timely mailing of the request for judicial review by producing a delivery confirmation or a certified mail return receipt document bearing evidence of the accurate post date.

(2)(A) The petition for review need not be verified but shall state the grounds upon which the review is sought.

(B) The Director of the Department of Workforce Services is made a party to the proceedings.

(C) The petition shall be served upon the director by leaving with him or her, or such representative as he or she may designate for that purpose, as many copies of the petition as there are respondents.

(b)(1)(A) With his or her answer or petition, the director shall file with the court a certified copy of the record of the case, including all documents and papers and a transcript of all testimony taken in the matter, together with the board's findings, conclusions, and decision.

(B) The record shall be certified by the Chair of the Board of Review.

(2)(A) Upon the filing of a petition for review by the director or upon the service of the petition on him or her, the director shall forthwith send by certified mail to each of the parties to the proceeding a copy of the petition.

(B) The mailing shall be deemed to be completed service upon all such parties.

(c)(1) In any proceeding under §§ 11-10-523 — 11-10-530, the findings of the board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive and the jurisdiction of the court shall be confined to questions of law.

(2)(A) No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the board.

(B) The board may, after hearing the additional evidence, modify its findings of fact or conclusions and file the additional or modified findings and conclusions, together with a certified transcript of the additional record, with the clerk of the court.

(d)(1) The proceedings shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the Workers' Compensation Law, § 11-9-101 et seq.

(2) It shall not be necessary as a condition precedent to judicial review of any decision of the board to enter exceptions to the rulings of the board.

(3) No bond shall be required as a condition of initiating a proceeding for judicial review or entering an appeal from the decision of the court upon the review.

History. Acts 1941, No. 391, § 6; 1943, No. 138, § 8; 1953, No. 162, § 10; 1979, No. 252, § 2; 1981, No. 43, § 9; 1983, No. 482, § 38; A.S.A. 1947, § 81-1107; Acts 1997, No. 234, § 20; 2003, No. 1223, § 11.

RESEARCH REFERENCES

Ark. L. Rev. Mandamus to Review Administrative Action in Arkansas, 11 Ark. L. Rev. 352.

U. Ark. Little Rock L. Rev. Survey of

Legislation, 2003 Arkansas General Assembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS

Evidence.
Findings of Facts.
Issues on Appeal.
Record of Case.
Remand.
Scope of Review.
Timeliness.

Evidence.

The Court of Appeals does not consider additional evidence filed except as ordered by the court and directed to the Board of Review. *Jones v. Director*, Ark. Emp. Sec. Dep't, 61 Ark. App. 155, 965 S.W.2d 789 (1998).

Appellate court could not grant claimant the relief sought because her argument depended upon facts not in evidence that were presented for the first time in her petition for judicial review; pursuant to subdivision (c)(2)(A), the appellate court was precluded from receiving additional evidence on appeal, nor could it remand for the Arkansas Board of Review to reopen its decision, even on a showing of good cause. *Allen v. Dir., Empl. Sec. Dep't.*, 84 Ark. App. 239, 139 S.W.3d 138 (2003).

Where an owner of a company used an expletive when calling a former employee a liar after she denied methamphetamine use, the employee voluntarily quit with good cause under § 11-10-513 when she left the premises a few minutes later; thus, substantial evidence supported a finding that she was entitled to unemployment benefits. *Pocahontas Elecs. v. Dir., Dep't of Workforce Servs.*, 96 Ark. App. 227, 240 S.W.3d 130 (2006).

Findings of Facts.

The findings of fact made by the Board of Review are conclusive upon judicial

review if supported by substantial evidence. *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950); *Terry Dairy Prods. Co. v. Cash*, 224 Ark. 576, 275 S.W.2d 12 (1955); *Shipley Baking Co. v. Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986); *Edwards v. Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988).

Whether the findings of the Board of Review are supported by substantial evidence is a question of law, and the Court of Appeals may reverse a finding of the Board of Review which is not supported by substantial evidence. *St. Vincent Infirmary v. Arkansas Employment Sec. Div.*, 271 Ark. 654, 609 S.W.2d 675 (1980); *Edwards v. Stiles*, 23 Ark. App. 96, 743 S.W.2d 12 (1988); *Cowan v. Director, Ark. Emp. Sec. Dep't*, 56 Ark. App. 17, 936 S.W.2d 766 (1997).

The findings of the Board of Review are conclusive on appeal if they are supported by the evidence. The definition of evidence in this context means substantial evidence, and whether the evidence is substantial is a question of law. *Murphy v. Everett*, 5 Ark. App. 281, 635 S.W.2d 301 (1982).

On appeal, the findings of fact of the board of review are conclusive if they are supported by substantial evidence; substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Perdrix-Wang v. Director, Emp. Sec. Dep't*, 42 Ark. App. 218, 856 S.W.2d 636 (1993).

On review of unemployment compensation cases, the factual findings of the Board of Review are conclusive if they are supported by substantial evidence. *Brown v. Director, Emp. Sec. Div.*, 54 Ark. App. 205, 924 S.W.2d 492 (1996).

Issues on Appeal.

Discharge in violation of a labor contract was not an issue in a court review and the court's judgment denying unemployment benefits was not *res judicata* of that issue. *Andrews v. Victor Metal Prods. Corp.*, 237 Ark. 540, 374 S.W.2d 816 (1964).

Where the issues of failure of the claimant to register for employment or his availability for employment were neither raised nor adjudicated prior to appeal to the circuit court from denial of benefits, the issues could not be raised on an appeal from the circuit court's reversal of the denial of benefits. *Stover v. Deere*, 249 Ark. 334, 461 S.W.2d 393 (1970).

Record of Case.

The director of labor must file a certified copy of the record of the case, including all documents, papers, and a transcript of the testimony, within a reasonable period of time; and a period of 90 days after the filing of the notice of appeal is a reasonable time within which to file the record on appeal. *Wortham v. Director of Labor*, 31 Ark. App. 175, 790 S.W.2d 909 (1990).

Remand.

When administrative board fails to make finding upon pertinent issue of fact case will be remanded. *Reddick v. Scott*, 217 Ark. 38, 228 S.W.2d 1008 (1950).

Where testimony indicated that a claimant was receiving periodic payments from some source, but there was no documentary evidence of the source of such payments, it was proper to remand to the Board of Review to take additional evidence on that issue, since the nature and source of the payments must be known in order to make a proper determination in the case. *Morris v. Everett*, 3 Ark. App. 280A, 625 S.W.2d 551 (1981).

When an administrative agency fails to make a finding upon a pertinent issue of fact, the courts do not decide the question in the first instance; the cause is remanded to the agency so a finding can be made on that issue. Thus, where the Board of Review, in holding that the defendant was liable for overpayments he had received, failed to consider whether the principles of equity and good conscience would be violated by requiring him to repay the benefits, the board's decision would be remanded. *Lawrence v.*

Everett, 9 Ark. App. 138, 653 S.W.2d 140 (1983).

Remand ordering the Board of Review enter an award requiring that unemployment benefits be paid to the employee was proper where he was an inmate who was transferred so as to render it impossible for him to continue in the company's employment; further, although subdivision (c)(2)(A) of this section authorized the appellate court to order that additional evidence be taken before the board, it did not issue such a directive. *Rankin v. Dir., Empl. Sec. Dep't*, 82 Ark. App. 575, 120 S.W.3d 169 (2003).

Scope of Review.

A reviewing court is required to view the testimony in the light most favorable to the successful party, if there is any rational basis for the board's findings based upon substantial evidence. *Rose v. Daniels*, 269 Ark. 679, 599 S.W.2d 762 (Ct. App. 1980); *Everett v. Jones*, 277 Ark. 162, 639 S.W.2d 739 (1982); *Farmer v. Everett*, 8 Ark. App. 23, 648 S.W.2d 513 (1983); *Haig v. Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983).

Decisions of the Board of Review are reversible on appeal to the courts only if they are found to be arbitrary, capricious, unreasonable, and without substantial evidence to support them or in cases of fraud or corruption. *Willis Johnson Co. v. Daniels*, 269 Ark. 795, 601 S.W.2d 890 (Ct. App. 1980).

Even though there was evidence in the record upon which the Board of Review might have reached a different result, the scope of judicial review was limited by this section, and the reviewing court was not privileged to substitute its findings for those of the Board of Review even though the court might have reached a different conclusion had it made the original determination upon the same evidence considered by the board. *Stagecoach Motel v. Krause*, 267 Ark. 1093, 593 S.W.2d 495 (Ct. App. 1980); *Feagin v. Everett*, 9 Ark. App. 59, 652 S.W.2d 839 (1983); *Shipley Baking Co. v. Stiles*, 17 Ark. App. 72, 703 S.W.2d 465 (1986).

Finding held not supported by substantial evidence. *Victor Indus. Corp. v. Daniels*, 1 Ark. App. 6, 611 S.W.2d 794 (1981).

In unemployment compensation cases, the scope of review by the court is governed by the substantial evidence rule.

Substantial evidence is defined as such relevant evidence as a reasonable person might accept as adequately supporting the conclusion. *Haig v. Everett*, 8 Ark. App. 255, 650 S.W.2d 593 (1983).

Neither the appeal tribunal nor the Board of Review is bound by common law or statutory rules of evidence. *Haynes v. Director of Labor*, 19 Ark. App. 71, 719 S.W.2d 437 (1986).

On appeal, the findings of fact of the Board of Review are conclusive if supported by substantial evidence, i.e., by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; appellate review is limited to determining whether the Board could reasonably reach its decision upon the evidence before it, and in making that determination, the evidence and all reasonable inferences deducible therefrom are reviewed in the light most favorable to the Board's findings. *White v. Director, Ark. Emp. Sec. Dep't*, 54 Ark. App. 197, 924 S.W.2d 823 (1996).

Timeliness.

The Court of Appeals has no authority to extend the deadline for filing a petition for review. *Wooten v. Daniels*, 271 Ark. 131, 607 S.W.2d 96 (1980).

Where employer never received written notice of determination, employer's appeal was timely under this section despite fact that it was filed after the permitted time for filing, since the fact that notice is not received is a circumstance beyond the employer's control. *Sprindale Farms v. Daniels*, 1 Ark. App. 89, 613 S.W.2d 117 (1981).

Claimant's argument that her appeal was untimely because of concentrated effort to secure employment was not an acceptable defense. *Nichols v. Stiles*, 11 Ark. App. 212, 668 S.W.2d 554 (1984).

Challenges to an application for unemployment benefits must be made in the first instance in a prompt manner or be lost, unless unmistakably reserved in the original determination. *Davis v. Stiles*, 287 Ark. 261, 698 S.W.2d 287 (1985), rehearing denied, 287 Ark. 261, 700 S.W.2d 369 (1985).

Claimant's motions for rule on the clerk were denied because the petitions for review were filed outside the twenty-day period provided in subsection (a); the court had no authority to extend the dead-

line for filing a petition for review, because the time for appeal from administrative agency determinations is a legislative matter. *Green v. Director*, 50 Ark. App. 208, 901 S.W.2d 860 (1995).

Although subdivision (b)(1) of this section provides that the Director shall file a certified copy of the record, this section does not specify a time period in which this must be done; although sanctions were not applied because there has not been precedent for applying sanctions for simply failing to file the record on appeal within 90 days after the notice of appeal has been filed by a claimant, the appellate court might in the future consider this opinion sufficient advance warning. *Brown v. Director, Emp. Sec. Div.*, 54 Ark. App. 205, 924 S.W.2d 492 (1996).

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Duvall v. Daniels*, 1 Ark. App. 50, 613 S.W.2d 116 (1981); *Massey v. Barnes*, 1 Ark. App. 329, 615 S.W.2d 398 (1981); *Taylor v. Everett*, 2 Ark. App. 181, 617 S.W.2d 864 (1981); *Rogers v. Daniels*, 2 Ark. App. 312, 621 S.W.2d 227 (1981); *Terry v. Director of Labor*, 3 Ark. App. 197, 623 S.W.2d 857 (1981); *Hamby v. Everett*, 4 Ark. App. 52, 627 S.W.2d 266 (1982); *Osterhout v. Everett*, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); *Woodus v. Everett*, 8 Ark. App. 111, 648 S.W.2d 528 (1983); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Jacks v. Stiles*, 19 Ark. App. 129, 717 S.W.2d 828 (1986); *Rogers v. Director of Labor*, 27 Ark. App. 128, 767 S.W.2d 319 (1989); *Perry v. Gaddy*, 48 Ark. App. 128, 891 S.W.2d 73 (1995); *Kilpatrick v. Director, Ark. Emp. Sec. Dep't.*, 55 Ark. App. 193, 934 S.W.2d 232 (1996); *Owens v. Director, Ark. Emp. Sec. Dep't.*, 55 Ark. App. 255, 935 S.W.2d 285 (1996); *Smith v. Arkansas Emp. Sec. Dep't.*, 55 Ark. App. 348, 934 S.W.2d 952 (1996); *Wenzl v. Director*, 60 Ark. App. 21, 959 S.W.2d 63 (1997); *Rouse v. Dir. of the Ark. Dep't of Workforce Servs.*, 2012 Ark. App. 186, — S.W.3d — (2012).

11-10-530. Claims — Administrative appeal — Representation.

(a) The Director of the Department of Workforce Services shall be a party entitled to notice in any proceeding involving a claim for benefits before a special examiner, an appeal tribunal, or the Board of Review.

(b) In any proceeding for judicial review pursuant to § 11-10-529, the director may be represented by any qualified attorney employed by the director and designated by him or her for that purpose, or at the director's request by the Attorney General.

History. Acts 1941, No. 391, § 6; 1943, No. 138, § 9; 1953, No. 162, §§ 4-10; A.S.A. 1947, § 81-1107.

CASE NOTES

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Duvall v. Daniels*, 1 Ark. App. 50, 613 S.W.2d 116 (1981); *Massey v. Barnes*, 1 Ark. App. 329, 615 S.W.2d 398 (1981); *Taylor v. Everett*, 2 Ark. App. 181, 617 S.W.2d 864 (1981); *Rogers v. Daniels*, 2 Ark. App. 312,

621 S.W.2d 227 (1981); *Terry v. Director of Labor*, 3 Ark. App. 197, 623 S.W.2d 857 (1981); *Hamby v. Everett*, 4 Ark. App. 52, 627 S.W.2d 266 (1982); *Osterhout v. Everett*, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); *Woodus v. Everett*, 8 Ark. App. 111, 648 S.W.2d 528 (1983); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Jacks v. Stiles*, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

11-10-531. Claims — Payment of benefits.

(a) Benefits shall be paid promptly in accordance with an initial determination or redetermination that the benefits are due or in accordance with a subsequent decision by any appellate tribunal, board, or court that the benefits are due.

(b) The pendency of an appeal shall not of itself suspend or stay the payment of benefits once they have been determined to be due.

(c) Benefits determined to be due shall remain payable during any appeal until the determination has been modified or reversed by a subsequent decision or redetermination, in which case payment of benefits shall be suspended until such time as benefits might later be determined or decided to be due.

History. Acts 1941, No. 391, § 6; 1943, No. 138, § 10; 1972 (Ex. Sess.), No. 58, § 1; A.S.A. 1947, § 81-1107.

CASE NOTES

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263

Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*, 271 Ark. 479, 609 S.W.2d 122 (1980); *Du-*

vall v. Daniels, 1 Ark. App. 50, 613 S.W.2d 116 (1981); Massey v. Barnes, 1 Ark. App. 329, 615 S.W.2d 398 (1981); Taylor v. Everett, 2 Ark. App. 181, 617 S.W.2d 864 (1981); Rogers v. Daniels, 2 Ark. App. 312, 621 S.W.2d 227 (1981); Terry v. Director of Labor, 3 Ark. App. 197, 623 S.W.2d 857 (1981); Hamby v. Everett, 4 Ark. App. 52, 627 S.W.2d 266 (1982); Osterhout v. Ever-

ett, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); Woodus v. Everett, 8 Ark. App. 111, 648 S.W.2d 528 (1983); Hirschy v. Everett, 8 Ark. App. 174, 649 S.W.2d 412 (1983); Linscott v. Director of Labor, 9 Ark. App. 103, 653 S.W.2d 150 (1983); Jacks v. Stiles, 19 Ark. App. 129, 717 S.W.2d 828 (1986).

11-10-532. Claims — Recovery.

(a)(1) If the Director of the Department of Workforce Services finds that any person has made a false statement or misrepresentation of a material fact knowing it to be false or has knowingly failed to disclose a material fact and as a result of either action has received any amount as benefits under this chapter to which the person was not entitled, then the person shall be liable to repay the amount to the Unemployment Compensation Fund, or in lieu of requiring the repayment, the director may recover the amount of the overpayment by deductions from any future benefits payable to the person under this chapter.

(2) Once the overpayment becomes final pursuant to § 11-10-527, the amount owed shall accrue interest at the rate of ten percent (10%) per annum beginning thirty (30) days after the date of the first billing statement.

(3) Beginning on July 1, 2001, a penalty of ten percent (10%) of the amount of the overpayment at the time the overpayment becomes final shall be assessed on all fraudulent overpayments. However, this penalty shall be waived in the event that the overpayment is repaid within one (1) year after the established date.

(b)(1) If the director finds that a person has received an amount as benefits under this chapter to which he or she was not entitled by reasons other than fraud, willful misrepresentation, or willful nondisclosure of facts, the person shall be liable to repay the amount to the fund.

(2) In lieu of requiring the repayment, the director may recover the amount by deduction of any future benefits payable to the person under this chapter unless the director finds that the overpayment was received without fault on the part of the recipient and that its recovery would be against equity and good conscience.

(c) Any person held liable to repay an amount to the fund shall be subject to having any state income tax refund to which he or she may be entitled intercepted pursuant to § 26-36-301 et seq., as administered by the Revenue Division of the Department of Finance and Administration.

(d)(1) When an overpayment becomes final under § 11-10-527, the director shall present a certificate of overpayment describing the amount owed by the claimant to the circuit clerk of the county where the claimant is domiciled.

(2) The circuit clerk shall enter the certificate of overpayment in the docket of the circuit court for judgments and decrees and note the time of the filing of the certificate.

(3) After entry by the circuit clerk, the certificate of overpayment shall have the force and effect of a judgment of the circuit court and shall bear interest at the rate of ten percent (10%) annually.

(4) Any interest or penalty payment recovered from an overpayment to a claimant shall be deposited into the Department of Workforce Services Special Fund.

(e) The federal income tax refund of a person held liable to repay an amount to the fund is subject to interception under Pub. L. No. 111-291 and any rule adopted to implement that law.

History. Acts 1941, No. 391, § 6; 1963, No. 93, § 8; 1981, No. 43, § 10; 1985, No. 8, § 7; 1985, No. 9, § 7; A.S.A. 1947, § 81-1107; Acts 1987, No. 753, § 16; 1993, No. 6, § 10; 1997, No. 234, § 21; 1999, No. 1116, §§ 13, 14; 2001, No. 1367, § 8; 2005, No. 902, § 7; 2007, No. 490, § 9; 2009, No. 802, §§ 9-11; 2011, No. 1040, § 3.

Amendments. The 2011 amendment, in (e), substituted “is subject” for “as the result of a finding of fraud shall be subject” and “under Pub. L. No. 111-291” for “pursuant to Pub. L. No. 110-328,” and deleted “or regulation” following “rule.”

CASE NOTES

ANALYSIS

Construction.
Overpayment.

Construction.

This section and § 11-10-519 required the recipient to repay all benefits received during the period she was disqualified for committing fraud, not just the amount of overpayment after calculating unreported income. *Hunt v. Director, Emp. Sec. Dep’t*, 57 Ark. App. 152, 942 S.W.2d 873 (1997).

Overpayment.

Before a claimant who has been paid benefits to which she was not entitled can be required to repay the amount so received, due process requires that she has been afforded the opportunity of a hearing, after proper notice, upon all the issues set out in this section. *Prichett v. Director of Labor*, 5 Ark. App. 194, 634 S.W.2d 397 (1982).

If an unemployment compensation claimant has been paid benefits to which he was not entitled, due process requires that his liability to repay the amount so received must be determined after he has been afforded the opportunity of a hearing, after proper notice, upon all the issues set out in this section. *Farmer v.*

Everett, 8 Ark. App. 23, 648 S.W.2d 513 (1983).

Evidence supported a determination that the appellant was liable to repay \$1,155 based upon a finding that he received benefits to which he was not entitled and that it would not violate equity and good conscience to require repayment where (1) after receiving benefits, the appellant was later disqualified by a decision of the Appeal Tribunal, which decision was not appealed and became final, and (2) at the time of the hearing on the repayment question, the appellant was unemployed, his wife was earning \$ 30 per week, their monthly expenses for necessities were approximately \$ 1,000, they owned their own home, they also owned a 1993 Buick Regal and a 1992 Nissan pickup, both paid-in-full, and they had about \$ 14,000 in savings. *Trigg v. Director Ark. Empl. Sec. Dep’t*, 72 Ark. App. 266, 34 S.W.3d 783 (2000).

Pursuant to subdivision (b)(1)(B) of this section, requiring a worker to repay the overpayment of benefits would violate principles of equity and good conscience where there was substantial evidence that his wife’s sources of funds were extremely limited, due to the fact that she was attending school, and the household ex-

penses exceeded the household income. *Peterson v. Dir., Empl. Sec. Dep't*, 90 Ark. App. 19, 203 S.W.3d 655 (2005).

Where the appellate court was unable to reconcile the Arkansas Board of Review's findings of claimant's expenditures with the facts in the record, and where claimant had no savings, the board's decision to hold her liable to repay the overpaid unemployment benefits under subdivision (b)(1) of this section was not supported by substantial evidence. *Tilson v. Dir., Ark. Empl. Sec. Dep't.*, 91 Ark. App. 111, 208 S.W.3d 819 (2005).

Cited: *Andrews v. Victor Metal Prods. Corp.*, 241 Ark. 889, 411 S.W.2d 515 (1967); *Garrett v. Cline*, 257 Ark. 829, 520 S.W.2d 281 (1975); *Harris v. Daniels*, 263 Ark. 897, 567 S.W.2d 954 (1978); *Bradshaw v. Daniels*, 268 Ark. 716, 595 S.W.2d 254 (Ct. App. 1980); *Hodnett v. Daniels*,

271 Ark. 479, 609 S.W.2d 122 (1980); *Duvall v. Daniels*, 1 Ark. App. 50, 613 S.W.2d 116 (1981); *Massey v. Barnes*, 1 Ark. App. 329, 615 S.W.2d 398 (1981); *Taylor v. Everett*, 2 Ark. App. 181, 617 S.W.2d 864 (1981); *Rogers v. Daniels*, 2 Ark. App. 312, 621 S.W.2d 227 (1981); *Terry v. Director of Labor*, 3 Ark. App. 197, 623 S.W.2d 857 (1981); *Hamby v. Everett*, 4 Ark. App. 52, 627 S.W.2d 266 (1982); *Osterhout v. Everett*, 6 Ark. App. 216, 639 S.W.2d 539, 36 A.L.R.4th 392 (1982); *Woodus v. Everett*, 8 Ark. App. 111, 648 S.W.2d 528 (1983); *Hirschy v. Everett*, 8 Ark. App. 174, 649 S.W.2d 412 (1983); *Linscott v. Director of Labor*, 9 Ark. App. 103, 653 S.W.2d 150 (1983); *Jacks v. Stiles*, 19 Ark. App. 129, 717 S.W.2d 828 (1986); *Wall v. Dir., Empl. Sec. Dep't*, 83 Ark. App. 424, 128 S.W.3d 480 (2003).

11-10-533. Claims — Investigation of claims filed by state employees.

(a) The Department of Workforce Services shall investigate all claims for benefits filed by state employees whether or not the employing state agency lodges a protest to the payment of the benefits.

(b) The investigation shall result in a determination of the eligibility of the employee for payment of benefits.

History. Acts 1977, No. 925, § 3; 1991, No. 100, § 33.

11-10-534. Extended benefits — Definitions.

As used in §§ 11-10-534 — 11-10-543, unless the context clearly requires otherwise:

(1) "Additional benefits" means benefits payable to exhaustees by reason of conditions of high unemployment or by reason of other special factors under the provisions of any state law;

(2) "Eligibility period" of an individual means the period consisting of the weeks in his or her benefit year which begin in an extended benefit period and, if his or her benefit year ends within that extended benefit period, any weeks thereafter which begin in that period;

(3) "Exhaustee" means an individual who, with respect to any week of unemployment in his or her eligibility period:

(A)(i) Has received, prior to that week, all of the regular benefits that were available to him or her under this chapter or any other state law, including dependents' allowances and benefits payable to federal civilian employees and ex-service personnel under 5 U.S.C. § 8501 et seq. in his or her current benefit year that includes that week.

(ii) For the purposes of this subdivision, an individual shall be deemed to have received all of the regular benefits that were available to him or her although:

(a) As a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his or her benefit year, he or she may subsequently be determined to be entitled to added regular benefits; or

(b) He or she may be entitled to regular benefits with respect to future weeks of unemployment, but benefits are not payable with respect to such week of unemployment by reason of the provisions of § 11-10-506 or the parallel provisions of any other state law;

(B) His or her benefit year having expired prior to such week, he or she has no wages or insufficient wages on the basis of which he or she could establish a new benefit year that would include that week or, having established a benefit year, no regular compensation is payable to him or her during that year because his or her wage credits were cancelled or his or her right to regular compensation was totally reduced as a result of the application of disqualification;

(C)(i) Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965, and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

(ii) Has not received and is not seeking unemployment benefits under the unemployment compensation law of the Virgin Islands or of Canada. If he or she is seeking benefits and the appropriate agency finally determines that he or she is not entitled to benefits under law, he or she is considered an exhaustee. However, this provision shall not be applicable to individuals seeking benefits under the unemployment compensation laws of the Virgin Islands on and after the date the Virgin Islands meets the definition of a state as set forth in § 11-10-213.

(4) "Extended benefit period" means a period that:

(A) Begins with the third week after the first week for which there is a state "on" indicator; and

(B) Ends with:

(i) The third week after the first week for which there is a state "off" indicator; or

(ii) The thirteenth consecutive week of such period;

(C) Provided that no extended benefit period may begin before the fourteenth week following the end of a prior extended benefit period which was in effect with respect to this state;

(5) "Extended benefits" means benefits, including benefits payable to federal civilian employees and to ex-service personnel pursuant to 5 U.S.C. § 8501 et seq. payable to an individual under the provisions of this section for weeks of unemployment in his or her eligibility period;

(6) There is a state "off" indicator for a week if, for the period consisting of that week and the immediately preceding twelve (12) weeks, either subdivision (2)(A) or (B) of this section was not satisfied;

(7) There is a state “on” indicator for a week if the rate of insured unemployment under this chapter for the period consisting of such week and the immediately preceding twelve (12) weeks:

(A) Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding thirteen-week period ending in each of the preceding two (2) calendar years; and

(B) Equalled or exceeded four percent (4%), provided that for periods beginning on and after September 25, 1982, such rate equalled or exceeded five percent (5%); except that effective July 1, 1991, the rate of insured unemployment equalled or exceeded six percent (6%) even though the provisions of subdivision (2)(A) of this section were not met;

(8) “Rate of insured unemployment”, for purposes of subdivision (2) of this section, means the percentage derived by dividing:

(A) The average weekly number of individuals filing claims for regular benefits in this state for weeks of unemployment with respect to the most recent thirteen (13) consecutive week period, as determined by the Director of the Department of Workforce Services on the basis of his or her reports to the United States Secretary of Labor; by

(B) The average monthly employment covered under this chapter for the first four (4) of the most recent six (6) completed calendar quarters ending before the end of such thirteen-week period; and

(9) “State law” means the unemployment insurance law of any state, approved by the Secretary of Labor under § 3304 of the Internal Revenue Code of 1954.

History. Acts 1971, No. 35, § 21; 1973, No. 350, §§ 5-7; 1975, No. 609, §§ 13-15; 1975 (Extended Sess., 1976), No. 1083, § 11; 1977, No. 376, §§ 17, 18; 1979, No. 492, § 15; 1979, No. 922, § 15; 1981 (Ex. Sess.), No. 37, §§ 3-5; 1983, No. 482, § 35; A.S.A. 1947, § 81-1124; reen. Acts 1987, No. 672, § 10; Acts 1991, No. 48, § 6.

A.C.R.C. Notes. Part of this section was reenacted by Acts 1987, No. 672, § 10. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Publisher’s Notes. Acts 1977, No. 366, § 11, which amended Acts 1971, No. 35, § 21, provided that, except as may be provided otherwise, the provisions of this section should become effective on and after July 1, 1971.

U.S. Code. The Railroad Unemployment Insurance Act referred to in this section is codified as 45 U.S.C. § 351 et seq. The Trade Expansion Act of 1962 is codified as 19 U.S.C. § 1801 et seq. The Automotive Products Trade Act of 1965 is codified as 19 U.S.C. § 2001 et seq. Section 3304 of the Internal Revenue Code of 1954 is codified as 26 U.S.C. § 3304.

CASE NOTES

Cited: Walker v. Everett, 8 Ark. App. 12, 648 S.W.2d 496 (1983); Walker v. Di-

rector, Emp. Sec. Dep’t., 40 Ark. App. 12, 840 S.W.2d 200 (1992).

11-10-535. Extended benefits — Effect of provisions relating to regular benefits.

Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the Director of the Department of Workforce Services, the provisions of this chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

History. Acts 1971, No. 35, § 21; A.S.A. of this section, see Publisher's Notes, § 11-10-534.
1947, § 81-1124.

Publisher's Notes. As to effective date

CASE NOTES

Cited: Walker v. Everett, 8 Ark. App. 12, 648 S.W.2d 496 (1983).

11-10-536. Extended benefits — Eligibility.

An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his or her eligibility period only if the Director of the Department of Workforce Services finds that with respect to that week:

(1) He or she is an exhaustee as defined in § 11-10-534(3);

(2) He or she has satisfied the requirements of §§ 11-10-534 — 11-10-543 for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits; and

(3)(A) He or she was paid wages that exceeded forty (40) times his or her weekly benefit amount during the base period that established his or her last benefit year for the receipt of regular benefits;

(B) He or she has one and one-half (1½) times his or her insured wages in the calendar quarter of the base period in which his or her insured wages were the highest; or

(C) He or she has provided evidence of twenty (20) weeks of full-time insured employment in the base period that served as the basis for his or her extended benefits claim.

History. Acts 1971, No. 35, § 21; 1981 (Ex. Sess.), No. 37, § 6; 1983, No. 482, §§ 35, 36; A.S.A. 1947, § 81-1124; Acts 1993, No. 6, § 11.

Publisher's Notes. As to effective date of this section, see Publisher's Notes, § 11-10-534.

CASE NOTES**Entitlement to Benefits.**

Evidence sufficient to find claimant was entitled to benefits. Dorn v. Everett, 8 Ark. App. 45, 648 S.W.2d 502 (1983).

Cited: Walker v. Everett, 8 Ark. App. 12, 648 S.W.2d 496 (1983).

11-10-537. Extended benefits — Weekly amount.

The weekly extended benefit amount payable to an individual for a week of total unemployment in his or her eligibility period shall be an amount equal to the weekly benefit amount payable to him or her during his or her applicable benefit year.

History. Acts 1971, No. 35, § 21; A.S.A. of this section, see Publisher's Notes, 1947, § 81-1124. § 11-10-534.

Publisher's Notes. As to effective date

CASE NOTES

Cited: Walker v. Everett, 8 Ark. App. 12, 648 S.W.2d 496 (1983).

11-10-538. Extended benefits — Total amount.

(a) The total extended benefit amount payable to any eligible individual with respect to his or her applicable benefit year shall be the least of the following amounts:

(1) Fifty percent (50%) of the total amount of regular benefits which are payable to him or her under this chapter in his or her applicable benefit year; or

(2) Thirteen (13) times his or her weekly benefit amount which was payable to him or her under this chapter for a week of total unemployment in the applicable benefit year.

(b) Notwithstanding any other provision of §§ 11-10-534 — 11-10-543, or of any federal law, including the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, if the benefit year of an adversely affected worker covered by a certification under Subchapter A, Chapter 2, Title II of the Trade Act of 1974, ends within an extended benefit period, the number of weeks of extended benefits that the worker would, but for this section, be entitled to in that extended benefit period shall be reduced but not below zero by the number of weeks for which the worker was entitled, during such benefit year, to trade readjustment allowances under Part I, Subchapter B, Chapter 2, Title II of the Trade Act of 1974. For purposes of this section, the terms "benefit year" and "extended benefit period" shall have the same respective meanings given to them in the Federal-State Extended Unemployment Compensation Act of 1970.

History. Acts 1971, No. 35, § 21; 1981 (Ex. Sess.), No. 37, § 7; A.S.A. 1947, § 81-1124.

Publisher's Notes. As to effective date of this section, see Publisher's Notes, § 11-10-534.

U.S. Code. The Omnibus Budget Rec-

onciliation Act of 1981 referred to in this section is codified throughout the United States Code. Title II, Chapter 2 of the Trade Act of 1974 is codified as 19 U.S.C. § 2271 et seq. The Federal-State Extended Unemployment Compensation Act is codified as 26 U.S.C. § 3304.

CASE NOTES

Cited: Walker v. Everett, 8 Ark. App. 12, 648 S.W.2d 496 (1983).

11-10-539. Extended benefits — Period and computations.

(a) Whenever an extended benefit period is to become effective in this state as a result of a state “on” indicator or an extended benefit period is to be terminated in this state as a result of a state “off” indicator, the Director of the Department of Workforce Services shall have published an appropriate notice in newspapers of general circulation in the state.

(b) Whenever during a period when emergency unemployment compensation benefits are being paid under the Emergency Unemployment Compensation Act of 1991 or under any subsequent extension or reenactment thereof, the state “on” indicator, as defined in § 11-10-534, triggers on a period of extended benefits, the Governor may elect not to implement the applicable state statutory provisions relative to unemployment compensation, including, but not limited to, §§ 11-10-534 — 11-10-543, and to continue the payment of benefits under the Emergency Unemployment Compensation Act of 1991 to those individuals who have exhausted their entitlement to regular unemployment compensation under state law.

(c) Computations required by the provisions of § 11-10-534(8) shall be made by the director in accordance with regulations prescribed by the United States Secretary of Labor.

History. Acts 1971, No. 35, § 21; 1983, No. 482, § 36; A.S.A. 1947, § 81-1124; Acts 1993, No. 6, § 12.

Publisher’s Notes. As to effective date of this section, see Publisher’s Notes, § 11-10-534.

U.S. Code. The Emergency Unemployment Compensation Act of 1991, referred to in this section, is codified as 26 U.S.C. § 3304.

CASE NOTES

Cited: Walker v. Everett, 8 Ark. App. 12, 648 S.W.2d 496 (1983).

11-10-540. Extended benefits — Financing.

(a)(1)(A) There is imposed an additional tax on every employer as defined in § 11-10-209 except an employer electing reimbursement under § 11-10-713 or an employer required to reimburse under § 11-10-404 of one-tenth of one percent (0.1%) on taxable wages to defray the cost of extended benefits.

(B) This extended benefit tax shall not be credited to the separate account of an employer but shall be paid into the Unemployment Compensation Fund Extended Benefits Account.

(2)(A) The payment of this tax shall be suspended for any rate year when the assets in this account, excluding any extended benefit taxes

not yet paid, on the computation date are more than two-tenths of one percent (0.2%) of total payrolls for employment during the preceding calendar year.

(B) "Total payrolls", for the purposes of this section, shall exclude payrolls of employers who have elected to reimburse the fund in lieu of contributions under § 11-10-404 or § 11-10-713.

(C)(i) For the purposes of this section, the "assets in this account" as of the computation date shall include only extended benefit tax payments which were paid on or before June 30, the computation date.

(ii) It shall include any accounts receivable from the United States for its share of extended benefit payments that have been paid from the fund and any accounts receivable from nonprofit employers who have elected to reimburse the fund for benefits paid.

(b) Extended benefits paid to an eligible individual shall not be charged to the separate account of each employer in the base period but shall be charged against the account.

History. Acts 1971, No. 35, § 21; 1973, No. 350, §§ 5-7; 1975, No. 609, § 16; A.S.A. 1947, No. 81-1124.

Publisher's Notes. As to effective date of this section, see Publisher's Notes, § 11-10-534.

CASE NOTES

Cited: Walker v. Everett, 8 Ark. App. 12, 648 S.W.2d 496 (1983).

11-10-541. Extended benefits — Overpayments.

The Director of the Department of Workforce Services shall establish and recover extended benefit overpayments in the manner prescribed in § 11-10-532.

History. Acts 1971, No. 35, § 21; 1977, No. 366, § 10; 1981, No. 43, § 17; A.S.A. 1947, § 81-1124.

Publisher's Notes. As to effective date of this section, see Publisher's Notes, § 11-10-534.

CASE NOTES

Cited: Walker v. Everett, 8 Ark. App. 12, 648 S.W.2d 496 (1983).

11-10-542. Extended benefits — Not payable under interstate benefit payment plan — Exceptions.

(a) Except as provided in subsection (b) of this section, an individual shall not be eligible for extended benefits for any week if:

(1) Extended benefits are payable for that week pursuant to an interstate claim filed in any state under the interstate benefit payment plan; and

(2) No extended benefit period is in effect for that week in that state.

(b) Subsection (a) of this section shall not apply with respect to the first two (2) weeks for which extended benefits are payable, determined without regard to this section pursuant to an interstate claim filed under the interstate benefit payment plan to the individual from the Unemployment Compensation Fund Extended Benefits Account established for the individual with respect to the benefit year.

History. Acts 1971, No. 35, § 21; 1981, of this section, see Publisher's Notes, No. 43, § 18; A.S.A. 1947, § 81-1124. § 11-10-534.

Publisher's Notes. As to effective date

CASE NOTES

Cited: Walker v. Everett, 8 Ark. App. 12, 648 S.W.2d 496 (1983).

11-10-543. Extended benefits — Failure to accept or seek suitable work.

(a) Notwithstanding the provisions of § 11-10-535, an individual shall be ineligible for payment of extended benefits for any week of unemployment in his or her eligibility period if the Director of the Department of Workforce Services finds that during that period:

(1) He or she failed to accept any offer of suitable work or failed to apply for any suitable work as defined under subsection (c) of this section to which he or she was referred by the director; or

(2) He or she failed to actively engage in seeking work as prescribed under subsection (f) of this section, unless he or she did not actively engage in seeking work because he or she was before any court of the United States or of any state pursuant to a lawfully issued summons to appear for jury duty. In that event, his or her entitlement to benefits shall be decided pursuant to the able and available requirements of § 11-10-507, without regard to the disqualification provisions otherwise applicable under subsection (b) of this section.

(b) Any individual who has been found ineligible for extended benefits by reason of the provision in subsection (a) of this section shall also be ineligible for extended benefits beginning with the first day of the week following the week in which the failure occurred and until he or she has been employed in each of four (4) subsequent weeks, whether or not consecutive, and has earned remuneration equal to not less than four (4) times his or her extended weekly benefit amount.

(c) For purposes of this section, the term "suitable work" means, with respect to any individual, any work that is within the individual's capabilities, provided that:

(1) The gross average weekly remuneration payable for the work exceeds the sum of the individual's average weekly benefit amount, as determined under § 11-10-537, plus the amount, if any, of supplemental unemployment benefits, as defined in section 501(c)(17)(D) of the Internal Revenue Code of 1954 payable to the individual for that week; and

(2) The work pays wages equal to the higher of:

(A) The minimum wages provided by § 6(a)(1) of the Fair Labor Standards Act of 1938, without regard to any exemption; or

(B) The state or local minimum wage.

(d) No individual shall be denied extended benefits for failure to accept an offer of, or referral to, any job which meets the definition of suitability as described in subsection (c) of this section if:

(1) The position was not offered to the individual in writing and was not listed with the employment service;

(2) The failure could not result in a denial of benefits under the definition of suitable work for regular benefit claimants in § 11-10-515 to the extent that the criteria of suitability in that section are not inconsistent with the provisions of this section; or

(3) The individual furnishes satisfactory evidence to the director that his or her prospects for obtaining work in his or her customary occupation within a reasonably short period are good. If evidence is deemed satisfactory for this purpose, the determination of whether any work is suitable with respect to an individual shall be made in accordance with the definition of suitable work in § 11-10-515 without regard to the definition specified by this section.

(e) Notwithstanding the provision of this section to the contrary, no work shall be deemed to be suitable work for an individual that does not accord with the labor standard provisions required by section 3304(a)(5) of the Internal Revenue Code of 1954 and set forth herein under § 11-10-515.

(f) For the purposes of subdivision (a)(2) of this section, an individual shall be treated as actively engaged in seeking work during any week if:

(1) The individual has engaged in a systematic and sustained effort to obtain work during the week; and

(2) The individual furnishes tangible evidence that he or she has engaged in effort during the week.

(g) The employment service shall refer any claimant entitled to extended benefits under this chapter to any suitable work which meets the criteria prescribed in subsections (c) and (d) of this section.

(h) An individual shall not be eligible to receive extended benefits with respect to any week of unemployment in his or her eligibility period if the individual has been disqualified for regular benefits under this chapter because he or she voluntarily left work, was discharged for misconduct, or refused an offer of suitable work unless the disqualification imposed for those reasons was satisfied with employment.

History. Acts 1971, No. 35, § 21; 1981, No. 43, § 19; 1985, No. 8, § 31; 1985, No. 9, § 31; A.S.A. 1947, § 81-1124.

Publisher's Notes. As to effective date of this section, see Publisher's Notes, § 11-10-534.

U.S. Code. Sections 501 and 3304 of the Internal Revenue Code of 1954 referred to in this section are codified as 26 U.S.C. §§ 501 and 3304, respectively. Section 6 of the Fair Labor Standards Act of 1938 is codified as 29 U.S.C. § 206.

CASE NOTES

ANALYSIS

Discharge for Misconduct.
Satisfaction of Disqualification.

Discharge for Misconduct.

Where, for unemployment compensation purposes, the claimant was discharged for misconduct rather than being laid off, the disqualification under § 11-10-514 would stand unless the claimant satisfied it by meeting the employment requirement of subsection (h) and where the claimant did not claim that he actually worked since his discharge, nor that his award of back wages satisfied the employment requirement of subsection

(h), denial of unemployment benefits was proper. *Dozier v. Everett*, 9 Ark. App. 247, 657 S.W.2d 567 (1983); *Walker v. Director, Emp. Sec. Dep't.*, 40 Ark. App. 12, 840 S.W.2d 200 (1992).

Satisfaction of Disqualification.

Under subsection (h), a worker disqualified by misconduct from receiving regular benefits can satisfy the penalty disqualification for extended benefits only by employment for the required period and amount. *Walker v. Director, Emp. Sec. Dep't.*, 40 Ark. App. 12, 840 S.W.2d 200 (1992).

Cited: *Walker v. Everett*, 8 Ark. App. 12, 648 S.W.2d 496 (1983).

11-10-544. Reciprocal arrangements with state and federal agencies.

(a) The Director of the Department of Workforce Services is authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby:

(1) Services performed by an individual for a single employing unit for which services are customarily performed in more than one (1) state shall be deemed to be services performed entirely within any one (1) of the states:

(A) In which any part of the individual's service is performed;

(B) In which the individual has his or her residence; or

(C) In which the employing unit maintains a place of business, provided there is in effect, as to the services, an election, approved by the agency charged with the administration of the state's unemployment compensation law, pursuant to which all the services performed by the individual for the employing unit are deemed to be performed entirely within the state;

(2) Potential rights to benefits accumulated under the unemployment compensation laws of one (1) or more states or under one (1) or more laws of the federal government, or both, may constitute the basis for the payment of benefits through a single appropriate agency under terms that the director finds will be fair and reasonable as to all affected interests and will not result in any substantial loss to the fund;

(3)(A) Wages or services, upon the basis of which an individual may become entitled to benefits under an unemployment compensation law of another state or of the federal government, shall be deemed to be wages for insured work for the purpose of determining his or her rights to benefits under this chapter. Wages for insured work, on the basis of which an individual may become entitled to benefits under this chapter, shall be deemed to be wages or services on the basis of

which unemployment compensation under the law of another state or of the federal government is payable.

(B) No arrangement shall be entered into unless it contains provisions for reimbursements to the fund for the benefits paid under this chapter upon the basis of the wages or services and provisions for reimbursements from the fund for such of the compensation paid under the other law upon the basis of wages for insured work as the director finds will be fair and reasonable as to all affected interests; and

(4) Contributions due under this chapter with respect to wages for insured work shall, for the purposes of §§ 11-10-716 — 11-10-722, be deemed to have been paid to the fund as of the date payment was made as contributions under another state or federal unemployment compensation law, but no such arrangement shall be entered into unless it contains such provisions for reimbursement to the fund of the contributions and the actual earnings thereon as the director finds will be fair and reasonable as to all affected interests.

(b)(1) Reimbursements paid from the fund pursuant to subdivision (a)(3) of this section shall be deemed to be benefits for the purpose of §§ 11-10-501 — 11-10-506, 11-10-517, and 11-10-801 — 11-10-804.

(2) The director is authorized to make to other state or federal agencies and to receive from other state or federal agencies reimbursements from or to the fund in accordance with arrangements entered into pursuant to subsection (a) of this section.

(c)(1) The administration of this chapter and of other state and federal unemployment compensation and public employment service laws will be promoted by cooperation between this state and other states and the appropriate federal agencies in exchanging services and making available facilities and information.

(2)(A) The director is authorized to make such investigations, secure and transmit such information, make available such services and facilities, and exercise such of the other powers provided herein with respect to the administration of this chapter as he or she deems necessary or appropriate to facilitate the administration of any unemployment compensation or public employment service law.

(B) In like manner, the director is authorized to accept and utilize information, services, and facilities made available to this state by the agency charged with the administration of any other unemployment compensation or public employment service law.

(d) To the extent permissible under the laws and United States Constitution, the director is authorized to enter into or cooperate in arrangements whereby facilities and services provided under this chapter and facilities and services provided under the unemployment compensation law of any foreign government may be utilized for the taking of claims and the payment of benefits under this chapter or under a similar law of the government.

(e) The director is authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or the

federal government, or both, and to sign specific agreements to carry out the provisions of arrangements, and to enter into agreement with any federal agency to pay benefits as an agent of the United States Government under any law passed by the Congress of the United States for the purpose of paying benefits to employees of the United States or persons entitled to benefits by reason of service in the United States armed forces.

(f) The director is authorized to make application for loans and grants with any governmental agency under any act of Congress that authorizes the making of such loans and grants.

History. Acts 1941, No. 391, § 18; 1955, No. 395, § 28; A.S.A. 1947, § 81-1121.

SUBCHAPTER 6 — SHARED WORK PLANS

SECTION.

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SECTION.

- 11-10-609. Eligibility for compensation.
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Publisher's Notes. This subchapter was enacted as an amendment to Acts 1941, No. 391, § 3(e). However, that provision had already been repealed by Acts 1985, No. 8, § 4 and No. 9, § 4, which took effect prior to the amendment.

Effective Dates. Acts 1985, Nos. 329, § 4 and 813, § 4: July 1, 1985. Emergency clauses provided: "It is hereby found and determined by the General Assembly that in order to aid the economic growth and well being of the State, and to reduce the number of workers who might otherwise become totally unemployed, an emergency is hereby declared and this Act being necessary for the preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1985."

Acts 1987, No. 753, § 30: July 1, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the de-

nial of benefits to unemployed workers, to make needed technical corrections to the Shared Work plan provisions which enable employers to avoid layoffs and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1987."

Acts 1991, No. 100, § 58: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of this act should become effective at the beginning of the next fiscal year; that the next fiscal

year begins on July 1, 1991 and this act may not go into effect until after July 1, 1991 unless an emergency is declared. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

Acts 1995, No. 519, § 14: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to

make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

11-10-601. Definitions.

As used in this subchapter, unless the context otherwise requires, the following definitions shall apply:

(1)(A) "Affected group" means two (2) or more employees designated by an employer to participate in a shared work plan.

(B) "Sub-group" means a group of employees which constitutes at least ten percent (10%) of the employees in an affected group;

(2) "Approved plan" means an employer's voluntary written plan for reducing unemployment under which a specified group of employees shares the work remaining after their normal weekly hours of work are reduced, which plan meets the requirements of § 11-10-604, and which plan has been approved in writing by the Director of the Department of Workforce Services;

(3) "Fringe benefits" include, but are not limited to, such advantages as health insurance (hospital, medical, and dental services, etc.), retirement benefits under defined benefit pension plans as defined in Section 3(35) of the Employee Retirement Income Security Act of 1974, paid vacation and holidays, sick leave, etc., which are incidents of employment in addition to the cash remuneration earned;

(4) "Normal weekly hours of work" means the normal hours of work for full-time and permanent part-time employees in the affected group when their employing unit is operating on its normal, full-time basis, not to exceed forty (40) hours and not including overtime;

(5) "Shared work benefits" means the unemployment compensation benefits payable to employees in an affected group under an approved plan as distinguished from the unemployment benefits otherwise payable under other provisions of this chapter;

(6) "Shared work employer" means an employer with a shared work plan in effect. An individual who, or an employing unit which, succeeds to or acquires, pursuant to § 11-10-710, an organization, trade, or business with a shared work plan in effect automatically becomes a shared work employer and adopts the plan if the individual or employing unit ratifies, in writing, the previously approved plan; and

(7) “Unemployment compensation” means the unemployment benefits payable under this chapter other than shared work benefits and includes any amounts payable pursuant to an agreement under any federal law providing for compensation, assistance, or allowances with respect to unemployment.

History. Acts 1985, No. 329, § 1; 1985, No. 813, § 1; A.S.A. 1947, § 81-1104n; 1974, referred to in this section, is codified as 29 U.S.C. § 1002(35).
Acts 1991, No. 100, § 34.

U.S. Code. Section 3(35) of the Em-

11-10-602. Applicability.

(a) Except as otherwise provided in this subchapter, provisions of this chapter that are applicable to unemployment compensation claimants shall apply to shared work unemployment compensation claimants.

(b) An individual who files an initial claim for shared work unemployment compensation benefits shall be provided, if eligible therefor, a monetary determination of entitlement to shared work unemployment compensation benefits and shall serve a waiting week.

History. Acts 1985, No. 329, § 1; 1985, No. 813, § 1; A.S.A. 1947, § 81-1104n.

11-10-603. Construction.

Nothing in this subchapter shall preclude an otherwise eligible claimant from drawing total or partial unemployment benefits when he or she has exhausted his or her shared work benefits.

History. Acts 1985, No. 329, § 1; 1985, No. 813, § 1; A.S.A. 1947, § 81-1104n.

11-10-604. Criteria for approval.

(a) An employer wishing to participate in a shared work program shall submit a signed written shared work compensation plan to the Director of the Department of Workforce Services for approval.

(b) The director shall approve a shared work unemployment compensation plan only if the following criteria are met:

(1) The plan applies to and identifies the specified affected group;

(2) The employees in the affected group or groups are identified by name, social security number, and by any other information required by the director;

(3) The usual weekly hours of work for employees in the affected group or groups are reduced by not less than ten percent (10%) and not more than forty percent (40%);

(4) Health benefits and retirement benefits under defined benefit pension plans, as defined in Section 3(35) of the Employee Retirement Income Security Act of 1974, and other fringe benefits will continue to

be provided to employees in the affected group or groups as though their work weeks had not been reduced;

(5) The plan certifies that the aggregate reduction in work hours is in lieu of temporary layoffs which would have affected at least ten percent (10%) of the employees in the affected group or groups to which the plan applies and which would have resulted in an equivalent reduction in work hours;

(6) During the previous four (4) months, the work force in the affected group has not been reduced by temporary layoffs of more than ten percent (10%) of the workers;

(7)(A) The plan applies to at least ten percent (10%) of the employees in the affected group.

(B)(i) If the plan applies to all employees in the affected group, the plan provides equal treatment to all employees of the group.

(ii) If the affected group is divided into subgroups, the plan provides equal treatment to employees within each subgroup;

(8)(A)(i) In the case of employees represented by an exclusive bargaining representative, the plan is approved in writing by the collective bargaining agent.

(ii) In the event that the certification of an exclusive bargaining representative has been appealed, such bargaining representative shall be considered to be the exclusive bargaining representative for work sharing plan purposes.

(B) In the absence of any bargaining representative, the plan must contain a certification by the employer that the employer has made the proposed plan, or a summary thereof, available to each employee in the affected group for inspection;

(9)(A) The plan includes a certified statement by the employer that each employee in the affected group would be eligible for normal unemployment compensation under § 11-10-507(5).

(B) Any employee who joins an affected group after the approval of the shared work plan is automatically covered under the previously approved plan, effective the week that the director receives written notice from the shared work employer that the employee has joined and certification that the employee meets the requirements of § 11-10-507(5);

(10) On the most recent computation date preceding the date of submittal of the shared work plan for approval, the total of all contributions paid on the employing unit's own behalf and credited to its account for all previous periods equaled or exceeded the regular benefits charged to its account for all previous periods;

(11) The plan will not serve as a subsidy of seasonal employment during the off-season nor as a subsidy of temporary part-time employment or intermittent employment; and

(12) The employer agrees to furnish reports relating to the proper conduct of the plan and agrees to allow the director or his or her authorized representatives access to all records necessary to verify the plan prior to approval and, after approval, to monitor and evaluate application of the plan.

History. Acts 1985, No. 329, § 1; 1985, No. 813, § 1; A.S.A. 1947, § 81-1104n; Acts 1987, No. 753, § 7; 1991, No. 100, §§ 35, 36.

U.S. Code. Section 3(35) of the Employee Retirement Income Security Act of 1974, referred to in this section, is codified as 29 U.S.C. § 1002 (35).

11-10-605. Approval or rejection.

(a) The Director of the Department of Workforce Services shall approve or reject a plan in writing within thirty (30) days of its receipt.

(b) Only one (1) plan may be approved for any one (1) employer during any twelve-month period.

(c) The reason for rejection shall be final and non-appealable, but the employer shall be allowed to submit another plan for approval not earlier than fifteen (15) days from the date of the last rejection.

History. Acts 1985, No. 329, § 1; 1985, Acts 1987, No. 753, § 8; 1991, No. 100, No. 813, § 1; A.S.A. 1947, § 81-1104n; § 37.

11-10-606. Effective date and duration of plan.

(a) A plan shall be effective on the date specified in the plan or on a date mutually agreed upon by the employer and the Director of the Department of Workforce Services but no earlier than the date of approval of the plan by the director.

(b)(1) It shall expire at the end of the twelfth full calendar month after its effective date or on the date specified in the plan if the date is earlier, provided that the plan is not previously revoked by the director.

(2) If a plan is revoked by the director, it shall terminate on the date specified in the director's written order of revocation.

History. Acts 1985, No. 329, § 1; 1985, Acts 1987, No. 753, § 9; 1991, No. 100, No. 813, § 1; A.S.A. 1947, § 81-1104n; § 38.

11-10-607. Revocation of approval.

(a)(1) The Director of the Department of Workforce Services may revoke approval of a plan for good cause.

(2) The revocation order shall be in writing and shall specify the date the revocation is effective and the reasons therefor.

(3) Good cause shall include, but not be limited to, failure to comply with the assurances given in the plan, unreasonable revision of productivity standards for the affected group, conduct or occurrences tending to defeat the intent and effective operation of the plan, and violation of any criteria on which approval of the plan was based.

(b) The action may be taken at any time by the director on his or her own motion, on the motion of any of the affected group's employees, or on the motion of the appropriate collective bargaining agent.

(c) However, the director shall review the operation of each qualified employer plan at least once during the twelve-month period that the plan is in effect to assure its compliance with the requirements of these provisions.

(d) Revocation of a plan for good cause by the director shall preclude approval of any subsequent plan submitted by the revoked plan employer during the twelve-month period beginning on the date of the revocation order.

History. Acts 1985, No. 329, § 1; 1985, Acts 1987, No. 753, § 10; 1991, No. 100, No. 813, § 1; A.S.A. 1947, § 81-1104n; § 39.

11-10-608. Modification of an approved plan.

(a) An operational, approved, shared work plan may be modified by the employer with the acquiescence of employee representatives if the modification is not substantial and is in conformity with the plan approved by the Director of the Department of Workforce Services, but the modifications must be reported promptly to the director.

(b)(1) If the hours of work are increased or decreased substantially beyond the level in the original plan or if any other conditions are changed substantially, the director shall approve or disapprove the modifications without changing the expiration date of the original plan.

(2) If the substantial modifications do not meet the requirements for approval, the director shall disallow that portion of the plan in writing as specified in § 11-10-607.

History. Acts 1985, No. 329, § 1; 1985, No. 813, § 1; A.S.A. 1947, § 81-1104n; Acts 1991, No. 100, § 40.

11-10-609. Eligibility for compensation.

An individual is eligible to receive shared work unemployment compensation benefits with respect to any week only if, in addition to monetary entitlement, the Director of the Department of Workforce Services finds that:

(1) During the week, the individual is employed as a member of an affected group under an approved shared work compensation plan that was approved prior to that week, and the plan is in effect with respect to the week for which the benefits are claimed;

(2) During the week, the individual is able to work and is available for the normal work week with the shared work employer;

(3) Notwithstanding any other provisions of this chapter to the contrary, an individual is deemed unemployed in any week for which remuneration is payable to him or her as an employee in an affected group for ninety percent (90%) or less than his or her normal weekly hours of work as specified under the approved shared work compensation plan in effect for the week;

(4) Notwithstanding any other provisions of this chapter to the contrary, an individual shall not be denied shared work unemployment compensation benefits for any week by reason of the application of provisions relating to availability for work and active search for work

with an employer other than the shared work unemployment compensation employer.

History. Acts 1985, No. 329, § 1; 1985, No. 813, § 1; A.S.A. 1947, § 81-1104n.

11-10-610. Amount of benefits — Filing of claims.

(a) The shared work unemployment compensation weekly benefit amount shall be the product of the regular weekly unemployment compensation amount multiplied by the percentage of reduction of at least ten percent (10%) in the individual's usual weekly hours of work.

(b) An individual may be eligible for shared work unemployment compensation benefits or unemployment compensation, as appropriate, except that no individual shall be eligible for combined benefits in any benefit year in an amount more than the maximum entitlement established for unemployment compensation, nor shall an individual be paid shared work unemployment compensation benefits for more than twenty-five (25) weeks, whether or not consecutive, in any benefit year pursuant to a shared work plan.

(c) The shared work unemployment compensation benefits paid an individual shall be deducted from the maximum entitlement amount established for that individual's benefit year.

(d) Claims for shared work unemployment compensation benefits shall be filed in the same manner as claims for unemployment compensation or as prescribed in regulations by the Director of the Department of Workforce Services.

History. Acts 1985, No. 329, § 1; 1985, No. 813, § 1; A.S.A. 1947, § 81-1104n; Acts 1991, No. 100, § 41; 2011, No. 861, § 6.
Amendments. The 2011 amendment substituted "twenty-five (25)" for "twenty-six (26)" in (b).

11-10-611. Entitlement to benefits under certain conditions.

(a) If an individual works in the same week for an employer other than the shared work employer, and his or her combined hours of work for both employers are greater than ninety percent (90%) of the normal hours of work with the shared work employer, he or she shall not be entitled to benefits under these shared work provisions or the unemployment compensation provisions.

(b)(1) If an individual works in the same week for both the shared work employer and another employer and his or her combined hours of work for both employers are equal to or less than ninety percent (90%) of the usual hours of work for the shared work employer, the benefit amount payable for that week shall be the weekly unemployment compensation amount reduced by the same percentage that the combined hours are of the usual hours of work.

(2) A week for which benefits are paid under this subsection shall count as a week of shared work unemployment compensation.

(c) If an individual, with the approval of the employer, did not work during any portion of the workweek, other than the reduced portion covered by the shared work plan, he or she shall not be disqualified for the absence or deemed ineligible for shared work unemployment benefits for that reason alone.

(d)(1) An individual who performs no services during a week for the shared work employer and is otherwise eligible shall be paid the full weekly unemployment compensation amount.

(2) Such a week shall not be counted as a week with respect to which shared work unemployment compensation was received.

(e)(1) An individual who does not work for the shared work employer during a week, but works for another employer and is otherwise eligible, shall be paid benefits for that week under the partial unemployment compensation provisions of this chapter.

(2) Such a week shall not be counted as a week with respect to which shared work unemployment compensation was received.

History. Acts 1985, No. 329, § 1; 1985, Acts 1987, No. 753, § 11; 1995, No. 519, No. 813, § 1; A.S.A. 1947, § 81-1104n; § 7.

11-10-612. Charging shared-work unemployment compensation.

(a) Shared work unemployment compensation shall be charged to the employer's experience rating accounts in the same manner as unemployment compensation is charged under this chapter.

(b) Employers liable for payments in lieu of contributions shall have shared work unemployment compensation attributed to service in their employ in the same manner as unemployment compensation is attributed.

History. Acts 1985, No. 329, § 1; 1985, No. 813, § 1; A.S.A. 1947, § 81-1104n.

11-10-613. Extended benefits.

An individual who has received all of the combined unemployment compensation and shared work unemployment compensation available in a benefit year shall be considered an exhaustee for purposes of extended benefits, as provided under the provisions of §§ 11-10-534 — 11-10-543, and, if otherwise eligible under those provisions, shall be eligible to receive extended benefits.

History. Acts 1985, No. 329, § 1; 1985, No. 813, § 1; A.S.A. 1947, § 81-1104n.

SUBCHAPTER 7 — CONTRIBUTIONS

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Effective Dates. Acts 1943, No. 135, § 2: Mar. 1, 1943. Emergency clause provided: "Whereas, the present future rates of unemployment contributions provided in Act 391 of 1941 have been found to be excessive so as to constitute a burden upon certain industries thus tending to retard the growth thereof and to make employment conditions therein unstable and uncertain and whereas, if such rates are reduced as herein provided such industries and employment therein will be stimulated thus resulting in the progress of such industries and stabilization of employment within the state which will promote the public peace, health and safety, the passage of this act is declared to be necessary for the preservation of the public peace, health and safety, and an emergency is hereby declared to exist and this act shall be effective from and after the date of its passage and approval."

Acts 1945, No. 8, § 2: Jan. 31, 1945. Emergency clause provided: "It is hereby ascertained and declared that due to the fact that serious confusion exists in the administration of the law under the present uncertainties and that such confusion is detrimental to the public peace, health, and safety an emergency is hereby de-

clared to exist and this act shall take effect and be in force from and after its passage."

Acts 1953, No. 162, § 22: July 1, 1953.

Acts 1955, No. 395, § 30: July 1, 1955.

Acts 1957, No. 133, § 2: Apr. 1, 1957.

Acts 1959, No. 238, § 2: approved Mar. 25, 1959. Emergency clause provided: "It having been determined by the General Assembly that the present necessity of keeping and preserving great numbers of inactive employer account files and other records is detrimental to and a burden on efficient administrative operation, and is unduly expensive; an emergency is hereby declared to exist, and this Act shall be in force and take effect from and after its passage."

Acts 1963, No. 93, § 13: July 1, 1963.

Acts 1965, No. 33, § 6: June 30, 1965. Emergency clause provided: "It is hereby found and determined by the General Assembly that this Act is immediately necessary in order to obtain satisfaction of certain amounts due the Federal Government in connection with the unemployment compensation program. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and

safety, shall take effect and be in full force from and after its passage except Section 2 hereof which shall become effective and in full force from and after June 30, 1965."

Acts 1971, No. 35, § 25: approved Feb. 3, 1971. Emergency clause provided: "It is determined by the General Assembly of the State of Arkansas that an unemployment crisis exists in this State and in order to give better protection to the unemployed and their families extended benefits of the unemployment insurance program should be made available and to alleviate as much as possible the suffering and distress caused by unemployment, it is necessary to work in cooperation with the federal government; and in order to receive the benefits of federal law and comply with the mandate of the United States Congress as provided in United States Public Law 91-373, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety, this Act shall take effect and be in force from and after its passage."

Acts 1973, No. 329, § 14: Mar. 14, 1973. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Employment Security laws of the State are in need of immediate clarification and revision in order to provide adequate protection to the working and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. Therefore, an emergency is hereby declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after its passage and approval."

Acts 1975, No. 609, § 19: Mar. 28, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State are in need of immediate clarification and revision in order to provide adequate protection to the working and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from

and after the date of its passage and approval."

Acts 1975 (Extended Sess., 1976), No. 1083, § 14: Jan. 30, 1976. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State of Arkansas are in need of immediate clarification and revision in order to provide adequate protection to the citizens of this State when they experience a period of unemployment and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1977, No. 366, § 14: Mar. 17, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State are in need of immediate clarification and revision in order to provide adequate protection to the employed and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1977, No. 376, § 21: approved Mar. 8, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to receive the benefits of Federal law and to comply with the mandate of the United States Congress as provided in United States Public Law 94-566 and in order to give better protection to the unemployed workers and their families, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, this Act shall take effect and be in force from and after its passage."

Acts 1977 (Ex. Sess.), No. 6, § 4: Aug. 15, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to exempt coverage of city and county units of local government, or local school districts, from

unemployment insurance coverage should the United States Supreme Court declare such coverage unconstitutional, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall take effect and be in force from and after its passage and approval."

Acts 1979, No. 492, § 18: Mar. 21, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to clarify certain provisions of the Employment Security Law that may be subject to misinterpretation and in order to bring the said Employment Security Law into conformity with the Federal Unemployment Tax Act as amended by P.L. 94-566, P.L. 95-19, and P.L. 95-216 so that Arkansas employers and workers may receive the benefits of the said Federal Unemployment Tax Act, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall take effect and be in full force and effect from and after its passage and approval."

Acts 1979, No. 922, § 18: Apr. 16, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to clarify certain provisions of the Employment Security Law that may be subject to misinterpretation and in order to bring the said Employment Security Law into conformity with the Federal Unemployment Tax Act as amended by P.L. 94-566, P.L. 95-19, and P.L. 95-216 so that Arkansas employers and workers may receive the benefits of the said Federal Unemployment Tax Act, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1981, No. 43, § 22: Feb. 10, 1981. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to restore and insure solvency to the State's unemployment insurance trust fund from which unemployment benefits are paid to unemployed Arkansas workers and in order to bring the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 96-364 and P.L. 96-499 and with P.L. 95-524,

96-249 and 96-265 so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1983, No. 482, § 41: Mar. 16, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to conform with P.L. 97-300 and to bring the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 97-248 and to insure the future solvency of the unemployment insurance fund so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1985, Nos. 8, 9, § 34: Jan. 30, 1985. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended by P.L. 98-21 and P.L. 98-369, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1987, No. 672, § 13: Apr. 7, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that because of the case *Ricarte v. State*, CR 86-31, a question has arisen over the validity of Act 1083 of the Extended Session of 1976; that this Act is a reenactment of the former law; and that

the immediate passage of this Act is necessary to clarify the state of the law on this issue. Therefore, an emergency is hereby declared to exist, and this Act being necessary for the immediately preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval."

Acts 1987, No. 753, § 30: July 1, 1987. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections to the Shared Work plan provisions which enable employers to avoid layoffs and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1987."

Acts 1989, No. 420, § 17: Mar. 8, 1989. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections, and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this Act being necessary for the immediately preservation of the public peace, health and safety shall take effect and be in full force after its passage and approval."

Acts 1991, No. 48, § 13: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to

make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1991."

Acts 1991, No. 100, § 58: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of this act should become effective at the beginning of the next fiscal year; that the next fiscal year begins on July 1, 1991 and this act may not go into effect until after July 1, 1991 unless an emergency is declared. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

Acts 1993, No. 6, § 21: Feb. 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 519, § 14: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to

bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

Acts 1997, No. 234, § 32: Feb. 21, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2001, No. 964, § 2: March 20, 2001. Acts 2001, No. 1367, § 11: Apr. 5, 2001. Acts 2001, No. 1528, § 2: Apr. 12, 2001. Acts 2001, No. 1628, § 2: Apr. 16, 2001. Emergency clauses provided: "It is hereby found and determined by the Eighty-third General Assembly that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may

receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2003, No. 1223, § 15: Apr. 10, 2003. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible in order to bring the Arkansas Employment Security Department into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

Acts 2005, No. 902, § 15: Mar. 16, 2005. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible to bring the Arkansas Employment Security Department into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive tax credits under the Federal Unemployment Tax Act and Arkansas workers may receive unemployment benefits whenever they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by

the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2007, No. 490, § 18: Mar. 26, 2007. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the act should go into effect as soon as possible in order to make needed technical changes; to enable the state to capture and utilize penalty and interest owing from claimants; and in order that the state might continue to be in compliance with the Federal Unemployment Tax Act, as amended. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

Acts 2007, No. 551, § 4: July 1, 2007. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the creation of the Department of Workforce Services Training Trust Fund and the Department of Workforce Services Unemployment In-

surance Administration Fund is necessary for the development of the workforce of the State of Arkansas and for the proper administration of the Arkansas Employment Security Law; that any delays in implementing these funds could cause irreparable harm to the administration of those programs; and that this act is necessary to achieve the purposes of those funds. Therefore, an emergency is declared to exist and this act being necessary for the preservation of the public peace, health, and safety shall become effective on July 1, 2007.”

Acts 2011, No. 1040, § 5: Apr. 1, 2011. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that eligible persons might lose unemployment benefits or have benefits delayed without this act; and that this act is immediately necessary to ensure the prompt determination of claims for unemployment benefits and the continued provision of unemployment benefits and services to eligible persons. Therefore, an emergency is declared to exist, and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

RESEARCH REFERENCES

Am. Jur. 76 *Am. Jur.* 2d, *Unemp. Comp.*, §§ 19, 21, 25.

C.J.S. 81 *C.J.S.*, *Soc. Sec.*, etc., § 192 et seq.

U. Ark. Little Rock L.J. *Survey of Arkansas Law, Civil Procedure*, 5 *U. Ark. Little Rock L.J.* 97.

CASE NOTES

ANALYSIS

Homestead Exemption.
Nature of Contributions.

Homestead Exemption.

Contributions under this subchapter do not constitute a property tax or tax assessed directly against homestead property and therefore do not come within the

exception in Ark. Const., Art. 9, § 3 and homestead cannot be made subject to lien for the contributions. *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958).

Nature of Contributions.

The legislature had the right to require that employers make contributions in the manner provided by former similar act

and required payments, though called contributions, were compulsory and therefore a tax. *Buckstaff Bath House Co. v. McKinley*, 198 Ark. 91, 127 S.W.2d 802 (1939), *aff'd*, 308 U.S. 358, 60 S. Ct. 279 (1939) (decision under prior law).

Contributions required under this chapter for unemployment compensation are an excise tax. *McCain v. Farmers Electric Co-operative Corp.*, 206 Ark. 15, 172 S.W.2d 933 (1943).

11-10-701. Accrual and payment by employer.

(a)(1) Contributions shall accrue and become payable by each employer for each calendar year in which the employer is subject to this chapter with respect to wages for employment.

(2) The contributions shall become due and be paid by each employer to the Director of the Department of Workforce Services for the Unemployment Compensation Fund in accordance with such regulations as the director may prescribe and shall not be deducted, in whole or in part, from the wages of individuals in employment for the employer.

(b) In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent ($\frac{1}{2}\text{¢}$) or more, in which case it shall be increased by one cent (1¢).

History. Acts 1941, No. 391, § 7; 1943, No. 138, § 11; 1963, No. 93, § 9; A.S.A. 1947, § 81-1108.

CASE NOTES

ANALYSIS

Benefits Erroneously Charged.
Rural Electrification Corporations.

Benefits Erroneously Charged.

Employers can be classified in respect to benefits correctly charged, but cannot be classified with respect to benefits erroneously charged. *Call v. Luten*, 219 Ark. 640, 244 S.W.2d 130 (1951).

Rural Electrification Corporations.

This chapter did not repeal § 23-18-329 passed by the same legislature exempting

cooperative nonprofit membership corporations organized to engage in rural electrification from excise taxes and the corporations are not subject to this tax. *McCain v. Farmers Electric Co-operative Corp.*, 206 Ark. 15, 172 S.W.2d 933 (1943).

Cited: Arkansas Employment Sec. Div. v. National Baptist Convention U.S.A., Inc., 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982); *Razorback Vacuum v. Director, Ark. Emp. Sec. Dep't*, 44 Ark. App. 19, 865 S.W.2d 649 (1993).

11-10-702. Rate of contributions.

Each employer shall pay contributions equal to two and nine-tenths percent (2.9%) of wages paid by the employer with respect to employment, except as may otherwise be prescribed in § 11-10-703.

History. Acts 1941, No. 391, § 7; 1943, No. 138, § 12; 1963, No. 93, § 9; 1971, No. 35, § 11; 1983, No. 482, § 25; A.S.A. 1947, § 81-1108.

CASE NOTES

New Employers.

The General Assembly has not delegated taxing authority to predecessor firms; the tax rate for new employers is fixed by legislative enactment. *Gill v. Arkansas Emp. Sec. Div.*, 306 Ark. 164, 812 S.W.2d 114 (1991).

Cited: *Lion Oil Ref. Co. v. McCain*, 204 Ark. 995, 166 S.W.2d 249 (1942); *Arkansas Employment Sec. Div. v. National Baptist Convention U.S.A., Inc.*, 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982).

11-10-703. Future rates — Maintenance of separate accounts.

(a)(1)(A) The Director of the Department of Workforce Services shall maintain a separate account for each employer and shall credit the employer's account with all the contributions paid on the employer's own behalf except as otherwise provided in §§ 11-10-701 — 11-10-715.

(B) However, nothing in this chapter shall be construed to grant any employer or individuals in the employer's service prior claims or rights to the amounts paid by the employer into the fund either on the employer's behalf or on behalf of such individuals.

(2)(A)(i) Regular benefits paid to an eligible individual based on an initial claim shall be charged to the separate account of each employer in the base period in the proportion to which wages paid by each employer to the individual during the base period bears to total wages paid by all such employers to such individual within the base period.

(ii)(a) However, regular benefits paid to an eligible individual after the individual has established a benefit year against a base-period employer under qualifying conditions and whose employment continued with the employer but who subsequently left the employment under conditions that would have been a noncharge under subdivisions (a)(3) and (4) of this section shall be charged through the date on which the subsequent separation occurred to the separate account of the base-period employer.

(b) Benefits paid from the established benefit year to an individual after the date on which the subsequent separation occurred shall not be charged to the separate account of the base-period employer.

(B) Nothing in §§ 11-10-701 — 11-10-715 shall be construed to limit regular benefits payable pursuant to §§ 11-10-501 — 11-10-506 and 11-10-609 — 11-10-613.

(3) However, regular benefit payments shall not be charged to the separate account of any employer if the employer provides the director with notices regarding separation from work as are required by regulations of the director if the director finds that:

(A) The claimant voluntarily left the employer without good cause connected with the work; or

(B) The claimant was discharged by the employer for misconduct connected with the work.

(4) Benefits paid to an individual who continues to remain in the employ of a base-period employer without a reduction in the number of

hours worked or wages paid shall not be charged to the separate account of the employer, provided that the individual is not employed on an as-needed or on-call basis.

(5) Benefits paid during an extended benefit period in accordance with §§ 11-10-534 — 11-10-543 shall not be charged to the separate account of each employer in the base period except as may otherwise be provided in §§ 11-10-701 — 11-10-715.

(b) Benefit payments made to any individual whose base-period wages include wages for previously uncovered services as defined in § 11-10-507(5)(C) shall not be charged to the separate account of any employer to the extent that the Unemployment Compensation Fund is reimbursed for the benefits pursuant to § 121 of Pub. L. No. 94-566.

History. Acts 1941, No. 391, § 7; 1949, No. 155, § 8; 1953, No. 162, § 11; 1955, No. 395, § 21; 1963, No. 93, § 9; 1971, No. 35, §§ 11-13; 1973, No. 350, §§ 2, 3; 1975, No. 609, § 6; 1977, No. 376, § 12; 1981, No. 43, § 11; 1983, No. 482, § 26; A.S.A. 1947, § 81-1108; Acts 1995, No. 519, § 8; 1997, No. 234, § 22; 2007, No. 490, § 10.

Publisher’s Notes. Acts 1941, No. 391, § 7, as amended, provided in part that:

“For rate years beginning prior to January 1, 1984:

If on the computation date, the total of all his contributions paid, excluding a payment which represents a stabilization tax payment or a payment which represents an extended benefit tax payment, on his own behalf for all previous periods equals or exceeds the total regular benefits charged to his account for all such previous periods, the contribution rate of an employer who has been subject to three or more years of benefit risk for the ensuing rate year, except as provided in subdivision (c)(3)(III) of this section, shall be that shown on the corresponding line which reflects his reserve ratio in schedule A which follows. The reserve ratio in this schedule is determined by dividing the excess of contributions paid over regular benefits charged by the annual taxable payroll.

SCHEDULE A

CONTRIBUTION RATE	RESERVE RATIO
2.7%	0.0% but less than 4.0%
2.5%	4.0% but less than 4.5%

CONTRIBUTION RATE	RESERVE RATIO
2.3%	4.5% but less than 5.0%
2.1%	5.0% but less than 5.5%
1.9%	5.5% but less than 6.0%
1.7%	6.0% but less than 6.5%
1.5%	6.5% but less than 7.0%
1.3%	7.0% but less than 7.5%
1.1%	7.5% but less than 8.0%
0.9%	8.0% but less than 8.5%
0.7%	8.5% but less than 9.0%
0.5%	9.0% but less than 9.5%
0.3%	9.5% but less than 10.0%
0.1%	10.0% or more

“Notwithstanding any other provision of this law, if, on the computation date, the total of all contributions paid on an employer’s own behalf and credited to his account for all previous periods is less than the regular benefits charged to his account for all such previous periods, his contribution rate shall be five percent (5%) for rate years beginning on and after January 1, 1981, except that,

“If on the computation dates for the current rate year and immediately pre-

ceding rate year, the total of all contributions paid on an employer's own behalf and credited to his account for all previous periods is less than the total regular benefits charged to his account for all such previous periods, his contribution rate shall be five and five-tenths percent (5.5%) for rate years beginning on and after January 1, 1982, except that,

"If on the computation dates for the current rate year and the two (2) immediately preceding rate years, the total of all

contributions paid on an employer's own behalf and credited to his account for all previous periods is less than the total regular benefits charged to his account for all such previous periods, his contribution rate shall be six percent (6%) for rate years beginning on and after January 1, 1983."

U.S. Code. Section 121 of Pub. L. 94-566 is codified as a note under 26 U.S.C. § 3304.

CASE NOTES

Cited: Arkansas Employment Sec. Div. Inc., 275 Ark. 374, 630 S.W.2d 31 (Ark. v. National Baptist Convention U.S.A., 1982).

11-10-704. Future rates — Experience rates generally.

(a) The Director of the Department of Workforce Services shall, for each calendar year, classify employers in accordance with their actual experience in the payment of contributions on their own behalf and with respect to regular benefits charged against their accounts, with a view to fixing the contribution rates as will reflect their experience.

(b) The director shall determine the contribution rates of each employer in accordance with the requirements of this section and § 11-10-705:

(1) Each employer's rate shall be two and nine-tenths percent (2.9%) except as otherwise provided in the other provisions of this subchapter.

(A)(i) No employer's rate shall be less than two and nine-tenths percent (2.9%) unless and until there shall have been three (3) years immediately preceding the computation date throughout which an individual the employer's employ could have received benefits if eligible. Provided, however, an employer who, at the time of establishing an account, is in business in another state or states and who is not currently doing business in Arkansas may elect to receive a beginning contribution rate of two and nine-tenths percent (2.9%) or a contribution rate based on the rate schedule at § 11-10-705(b)(1), whichever is lower, but in no event less than one percent (1%), provided:

(a) The employer has been in operation in the other state or states for at least three (3) years immediately preceding the date of becoming a liable employer in Arkansas, throughout which an individual in the employer's employ could have received benefits if eligible;

(b) The employer must provide the authenticated account history from information accumulated from operations in the other state or all the other states to compute a current Arkansas rate; and

(c) The employer's business operations established in Arkansas are of the same nature as conducted in the other state or states, as defined by the North American Industry Classification system.

(ii) The election authorized in subdivision (b)(1)(A)(i) of this section must be made in writing within thirty (30) days after receiving notice of Arkansas liability. A two and nine-tenths percent (2.9%) rate will be assigned unless a timely election has been made.

(iii) If the election is made timely, the employer's account will receive the rate elected for the remainder of that rate year. The rate assigned for the next and subsequent years will be determined by the condition of the account on the computation date.

(B) However, any employer having no covered employment under this chapter for any calendar year shall have a rate equal to his or her most recently determined contribution rate until the employer has one (1) full year of benefit risk experience immediately preceding the computation date.

(2)(A) Notwithstanding any other provisions of §§ 11-10-701 — 11-10-715, if the director determines that an employer has willfully submitted false information which is material with respect to the employment or separation from employment of any claimant, employee, or former employee, for the purpose of preventing regular benefit charges to the employer's account, the employer shall be assessed a penalty equivalent to twice the amount of the claimant's maximum potential benefit amount.

(B) This charge shall be charged against the employer's account for experience rating purposes, regardless of whether or not the employer is a base-period employer and irrespective of the identity or number of base-period employers.

(3) An employer who changes from reimbursement to the contributory method of financing shall be considered a new or newly covered employer and can be entitled to an experience rate only when the new or newly covered employer has met the requirements of this subdivision (b)(3).

(4) Each employer's rate beginning January 1 for each twelve-month period shall be determined on the basis of the employer's record through June 30 of the previous calendar year.

History. Acts 1941, No. 391, § 7; 1943, §§ 10, 11; 1973, No. 350, §§ 2, 3; 1975, No. 135, § 1; 1947, No. 398, § 6; 1955, No. 609, § 6; A.S.A. 1947, § 81-1108; Acts 395, § 22; 1957, No. 133, § 1; 1963, No. 2001, No. 1528, § 1; 2005, No. 902, § 8. 93, § 9; 1971, No. 35, § 11; 1973, No. 329,

CASE NOTES

Cited: Arkansas Employment Sec. Div. Inc., 275 Ark. 374, 630 S.W.2d 31 (Ark. v. National Baptist Convention U.S.A., 1982).

11-10-705. Future rates — Computation of contribution rates.

(a)(1) Each employer's contribution rate beginning January 1 for each twelve-month period shall be determined on the basis of the employer's record through June 30 of the previous calendar year.

(2) The record of an employer shall include, for the purpose of computing an employer's contribution rate, any payment, except a payment that represents a stabilization tax payment or a payment that represents an extended benefit tax payment, made by the employer on or before July 31 on wages paid by the employer on or before June 30 of the calendar year.

(b)(1)(A) The contribution rate of an employer who has had three (3) or more years of benefit risk as defined at § 11-10-707 shall be that shown on the corresponding line that reflects the employer's reserve ratio in the contribution rate schedule which follows.

(B) The reserve ratio in the following schedule is determined by dividing the difference in contributions paid and regular benefits charged by the annual taxable payroll:

CONTRIBUTION RATE	RESERVE RATIO
0.1%	9.95% or more
0.3%	9.35% but less than 9.95%
0.5%	8.85% but less than 9.35%
0.8%	8.65% but less than 8.85%
1.2%	8.35% but less than 8.65%
1.6%	7.95% but less than 8.35%
2.0%	7.35% but less than 7.95%
2.4%	6.75% but less than 7.35%
2.8%	5.45% but less than 6.75%
3.2%	2.45% but less than 5.45%
4.0%	1.35% but less than 2.45%
5.0%	Less than 1.35% with a positive reserve balance
6.0%	Less than 0.00%

(2)(A) Notwithstanding any other provision of this chapter, for any calendar year beginning on and after January 1, 2008, an employer that has been assigned a contribution rate of six percent (6%) pursuant to this chapter and that has had such a rate for the two (2) preceding calendar years will be assigned an additional contribution assessment of two percent (2%).

(B) Furthermore, after two (2) consecutive years of being assessed an additional contribution of two percent (2%) under subdivision (b)(2)(A) of this section, this additional contribution assessment shall increase to four percent (4%).

(c)(1)(A) Notwithstanding any other provisions of this chapter and unless prohibited by § 11-10-723(c)(1), an employer that has been assigned a contribution rate pursuant to this chapter may make a voluntary payment to the Unemployment Compensation Trust Fund, in addition to the contributions required pursuant to this chapter, to be credited to the employer's account.

(B) The Director of the Department of Workforce Services shall provide to each eligible employer an annual notice of voluntary payment amounts that may be submitted to reduce the employer’s contribution rate.

(2)(A)(i) Voluntary payments to the fund under subdivision (c)(1) of this section shall be made no later than March 31 of the calendar year for which the new contribution rate is effective.

(ii) Upon receipt of a timely voluntary payment, the director shall compute a new contribution rate for the employer and provide notice to the employer of the new contribution rate.

(B) Any adjustments made under §§ 11-10-703 — 11-10-708 shall be used only in the form of credit against accrued or future contributions.

(C) No refund shall ever be made to any employer of any voluntary payment so made.

History. Acts 1941, No. 391, § 7; 1947, No. 398, § 6; 1949, No. 155, § 10; 1953, No. 162, § 12; 1955, No. 395, § 23; 1959, No. 142, § 1A; 1963, No. 93, § 9; 1971, No. 35, §§ 11-13; 1981, No. 43, § 12; 1983, No. 482, § 27; A.S.A. 1947, § 81-1108; Acts 1989, No. 420, §§ 8, 9; 1991, No. 48, § 7; 1997, No. 234, § 23; 1999, No. 1055, § 1; 2001, No. 964, § 1; 2001, No. 1367, § 9; 2005, No. 902, § 9; 2007, No. 490, § 11.

Publisher’s Notes. Acts 1941, No. 391, § 7, as amended, provided in part that:

“For rate years beginning prior to January 1, 1984:

If on the computation date, the total of all his contributions paid, excluding a payment which represents a stabilization tax payment or a payment which represents an extended benefit tax payment, on his own behalf for all previous periods equals or exceeds the total regular benefits charged to his account for all such previous periods, the contribution rate of an employer who has been subject to three or more years of benefit risk for the ensuing rate year, except as provided in subdivision (c)(3)(III) of this section, shall be that shown on the corresponding line which reflects his reserve ratio in schedule A which follows. The reserve ratio in this schedule is determined by dividing the excess of contributions paid over regu-

lar benefits charged by the annual taxable payroll.

SCHEDULE A	
CONTRIBUTION RATE	RESERVE RATIO
2.7%	0.0% but less than 4.0%
2.5%	4.0% but less than 4.5%
2.3%	4.5% but less than 5.0%
2.1%	5.0% but less than 5.5%
1.9%	5.5% but less than 6.0%
1.7%	6.0% but less than 6.5%
1.5%	6.5% but less than 7.0%
1.3%	7.0% but less than 7.5%
1.1%	7.5% but less than 8.0%
0.9%	8.0% but less than 8.5%
0.7%	8.5% but less than 9.0%

CONTRIBUTION RATE	RESERVE RATIO
0.5%	9.0% but less than 9.5%
0.3%	9.5% but less than 10.0%
0.1%	10.0% or more

“Notwithstanding any other provision of this law, if, on the computation date, the total of all contributions paid on an employer’s own behalf and credited to his account for all previous periods is less than the regular benefits charged to his account for all such previous periods, his contribution rate shall be five percent (5%) for rate years beginning on and after January 1, 1981, except that,

“If on the computation dates for the

current rate year and immediately preceding rate year, the total of all contributions paid on an employer’s own behalf and credited to his account for all previous periods is less than the total regular benefits charged to his account for all such previous periods, his contribution rate shall be five and five-tenths percent (5.5%) for rate years beginning on and after January 1, 1982, except that,

“If on the computation dates for the current rate year and the two (2) immediately preceding rate years, the total of all contributions paid on an employer’s own behalf and credited to his account for all previous periods is less than the total regular benefits charged to his account for all such previous periods, his contribution rate shall be six percent (6%) for rate years beginning on and after January 1, 1983.”

CASE NOTES

Cited: Arkansas Employment Sec. Div. Inc., 275 Ark. 374, 630 S.W.2d 31 (Ark. v. National Baptist Convention U.S.A., 1982).

11-10-706. Future rates — Stabilization tax.

(a)(1) Each employer shall be required to pay a stabilization tax on wages paid by the employer with respect to employment.

(2) This stabilization tax shall not be credited to the separate account of each employer.

(b) The stabilization tax shall be determined as follows:

(1) If the assets of the Unemployment Compensation Fund on the computation date are equal to or greater than two percent (2%) but less than two and one-half percent (2.5%) of total payrolls for employment during the preceding calendar year, the stabilization tax shall be one-tenth of one percent (0.1%);

(2) If the assets of the Unemployment Compensation Fund on the computation date are greater than one and one-half percent (1.5%) but less than two percent (2%) of total payrolls for employment during the preceding calendar year, the stabilization tax shall be two-tenths of one percent (0.2%);

(3) If the assets of the Unemployment Compensation Fund on the computation date are greater than one percent (1%) but less than one and one-half percent (1.5%) of total payrolls for employment during the preceding calendar year, the stabilization tax shall be three-tenths of one percent (0.3%);

(4) If the assets of the Unemployment Compensation Fund on the computation date are greater than one-half of one percent (0.5%) but less than one percent (1%) of total payrolls for employment during the

preceding calendar year, the stabilization tax shall be four-tenths of one percent (0.4%);

(5) If the assets of the Unemployment Compensation Fund on the computation date are less than one-half of one percent (0.5%) of total payrolls for employment during the preceding calendar year, the stabilization tax shall be seven-tenths of one percent (0.7%); and

(6) If the assets of the Unemployment Compensation Fund on the computation date are less than four-tenths of one percent (0.4%) of total payrolls for employment during the preceding calendar year, the stabilization tax shall be one and one-tenth percent (1.1%) for the calendar year 1993, nine-tenths of one percent (0.9%) for the calendar year 1994, and eight-tenths of one percent (0.8%) for the calendar year 1995 and thereafter.

(c) Each employer eligible for an experience rating under § 11-10-705 shall have the employer's contribution rate reduced by one-tenth of one percent (0.1%) for any rate year when the assets of the Unemployment Compensation Fund on the computation date are greater than five percent (5%) of total payrolls for employment during the preceding calendar year.

(d) Employers who have elected to reimburse the Unemployment Compensation Fund in lieu of contributions under § 11-10-404 or § 11-10-713 shall be excluded from the provisions of §§ 11-10-703 — 11-10-708 or any experience rate computation.

(e)(1) The provisions of this section shall not be effective for any rate year when the assets of the Unemployment Compensation Fund, excluding contributions not yet paid, on the computation date equal or exceed two and one-half percent (2.5%) but are less than five percent (5%) of total payrolls for employment during the preceding calendar year.

(2) For the purposes of §§ 11-10-703 — 11-10-708, total payrolls shall exclude payrolls of employers who have elected to reimburse the Unemployment Compensation Fund in lieu of contributions under § 11-10-404 or § 11-10-713.

(3)(A) For the purposes of §§ 11-10-703 — 11-10-708, the assets of the Unemployment Compensation Fund as of the computation date shall include only contributions which were paid on or before June 30, the computation date.

(B) Provided, however, for the purposes of this section, the computation date is defined as September 30 of the calendar year preceding the tax year.

(C) It shall include any accounts receivable from the United States for its share of extended benefit payments which have been paid from the Unemployment Compensation Fund and any accounts receivable from employers who have elected to reimburse the Unemployment Compensation Fund for benefits paid under § 11-10-404 or § 11-10-713.

(D) However, it shall exclude the assets of the Unemployment Compensation Fund Extended Benefits Account and shall be reduced by any outstanding advances owed to the federal government.

(f)(1)(A) Provided, however, the proceeds of the stabilization tax in the amount of two and one-half hundredths of one percent (.025%) of taxable wages collected during the period July 1, 2007, through June 30, 2015, shall be deposited and credited to the Department of Workforce Services Training Trust Fund, there to be used for worker training.

(B) The total amount deposited into the Department of Workforce Services Training Trust Fund in any one (1) fiscal year shall not exceed two million five hundred thousand dollars (\$2,500,000).

(2)(A) However, the proceeds of the stabilization tax in the amount of two and one-half hundredths of one percent (.025%) of taxable wages collected during the period July 1, 2007, through June 30, 2015, shall be deposited and credited to the Department of Workforce Services Unemployment Insurance Administration Fund, there to be used for operating expenses of the unemployment insurance program necessary for the proper administration of § 11-10-101 et seq., as determined by the Director of the Department of Workforce Services.

(B) The total amount deposited into the Department of Workforce Services Unemployment Insurance Administration Fund in any one (1) fiscal year shall not exceed two million five hundred thousand dollars (\$2,500,000).

(3) The director shall report to the State Employment Security Advisory Council and the Legislative Council on a quarterly basis as to any and all uses of the Department of Workforce Services Training Trust Fund and the Department of Workforce Services Unemployment Insurance Administration Fund.

History. Acts 1941, No. 391, § 7; 1963, No. 93, § 9; 1971, No. 35, § 12; 1973, No. 329, §§ 10, 11; 1975, No. 609, § 6; 1975 (Extended Sess., 1976), No. 1083, § 8; 1981, No. 43, §§ 11-13; 1983, No. 482, § 27; 1985, No. 8, § 8; 1985, No. 9, § 8; A.S.A. 1947, § 81-1108; reen. Acts 1987, No. 672, § 7; Acts 1989, No. 420, § 10; 1991, No. 48, § 8; 1993, No. 6, §§ 13, 14; 1997, No. 234, § 24; 2001, No. 1628, § 1; 2007, No. 551, § 3; 2011, No. 1040, § 4.

A.C.R.C. Notes. This section was reenacted by Acts 1987, No. 672, § 7. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

Amendments. The 2011 amendment substituted "2015" for "2011" in (f)(1)(A) and (f)(2)(A).

CASE NOTES

New Employers.

The General Assembly has not delegated taxing authority to predecessor firms; the tax rate for new employers is fixed by legislative enactment. *Gill v. Arkansas Emp. Sec. Div.*, 306 Ark. 164, 812 S.W.2d 114 (1991).

Cited: *Arkansas Employment Sec. Div. v. National Baptist Convention U.S.A., Inc.*, 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982).

11-10-707. Future rates — Definitions — Notifications.

(a)(1) As used in §§ 11-10-701 — 11-10-715:

(A) The term “annual payroll” means the total amount of taxable wages paid during a calendar year by an employer for employment and for the employer who has had three (3) or more years of benefit risk experience; and

(B) The term “average annual payroll” means the average of the annual payrolls for the last three (3) or the five (5) preceding calendar years, whichever is the lesser.

(2)(A) However, with respect to rate years beginning January 1, 1972, and thereafter, an employer who has been subject to three (3) or more years of benefit risk may voluntarily elect to be rated each year on the basis of total taxable wages paid during the preceding calendar year instead of the average of the annual payrolls for the last three (3) or last five (5) preceding calendar years, whichever is the lesser.

(B) A voluntary election by an employer shall be made at the time and in the manner prescribed by regulations of the Director of the Department of Workforce Services.

(C) Any voluntary election so made shall be irrevocable, except with respect to an employer who acquires the experience of the electing employer under the provision of § 11-10-710.

(b) The director shall for each rate year:

(1)(A)(i) Periodically notify each employer of the regular benefits paid that are chargeable to the employer’s account.

(ii) The notification shall become conclusive and binding upon the employer unless within thirty (30) days after mailing of the notice the employer files an application for review and redetermination as provided in subdivision (c)(1) of this section.

(B)(i) With the exception of charges that might be changed under § 11-10-703(a)(2)(A)(ii), an application for review and redetermination shall be made the first time that charges appear on the employer’s account as reflected on the quarterly statement of paid benefits.

(ii) Subsequent charges on the same claimant in the same benefit year may not be challenged; and

(2) Notify each employer of the employer’s rate of contribution as determined pursuant to §§ 11-10-701 — 11-10-715.

(c)(1)(A) The notice shall contain the contribution rate, and if the employer is eligible for an experience rating, the factors used in determining the individual employer’s experience rate, together with any other information the director may think necessary.

(B)(i) The determination of the director, including all the figures shown on the notice or notices issued under this subdivision (c)(1), shall become conclusive and binding upon the employer unless within thirty (30) days after the mailing of the notice or notices thereof to the employer’s last known post office address, the employer files an application for review and redetermination setting forth the employer’s reasons therefor.

(ii) The director may, if he or she finds the reasons set forth by the employer insufficient to change the benefit charges to the employer's account or the rate of contributions, deny the application; otherwise, it shall be granted and the charges adjusted and the rate redetermined.

(C) The employer shall be promptly notified by mailing to the employer's last known address the denial of the employer's application or of the redetermination, both of which shall become final and conclusive at the date of mailing of notification thereof.

(2) An employer may appeal from the determination of the director to the circuit court by filing a petition with the clerk of the circuit court in the county of the employer's residence or in Pulaski County Circuit Court within thirty (30) days of the mailing to the employer of notice of the determination.

(d) As used in §§ 11-10-703 — 11-10-708, an employer's "year of benefit risk" means a twelve-month period ending on June 30 throughout which any individual in the employer's employ could have received benefits chargeable to the employer's account.

History. Acts 1941, No. 391, § 7; 1943, No. 138, § 13; 1947, No. 398, § 6; 1949, No. 155, § 10; 1953, No. 162, § 13; 1955, No. 395, § 24; 1963, No. 93, § 9; 1971, No. 35, §§ 11-13; 1985, No. 8, § 9; 1985, No. 9, § 9; A.S.A. 1947, § 81-1108; Acts 1989, No. 420, § 11; 1993, No. 6, § 15; 2001, No. 1367, § 10; 2007, No. 490, §§ 12, 13.

CASE NOTES

Finality of Rates.

Where an employer failed to file a timely appeal from the Employment Security Division's determination of the employer's employment security rate, the employer was subsequently barred from challenging the rate since § 11-10-707(b) and (c) clearly provide for a finality of

contribution rates assigned employers. *Arkansas Emp. Sec. Div. v. Bearden Lumber Co.*, 5 Ark. App. 71, 632 S.W.2d 438 (1982).

Cited: *Arkansas Employment Sec. Div. v. National Baptist Convention U.S.A., Inc.*, 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982).

11-10-708. Future rates — Advance interest tax.

(a)(1)(A) In addition to the contributions and any stabilization and extended benefits taxes levied under other provisions of §§ 11-10-703 — 11-10-708, each employer, except employers that have made an election to reimburse the Unemployment Compensation Fund under § 11-10-713(c), shall pay a separate and additional tax, to be known as the advance interest tax, on wages paid by that employer with respect to employment.

(B) For rate years beginning on and after January 1, 1993, the advance interest tax shall be two-tenths of one percent (0.2%) when the state has an outstanding interest-bearing advance under Title XII of the Social Security Act.

(C) The tax is effective the first month of the quarter following the state's obtaining an interest-bearing advance and shall remain until the quarter immediately following the repayment of the advance-

ment and the Employment Security Advance Interest Trust Fund, § 19-5-935, attains a balance of five million dollars (\$5,000,000);

(2) For purposes of this section, the definition of the assets of the trust fund shall be the same as that set forth in § 11-10-706, and the computation date is defined as September 30 of the calendar year preceding the tax year.

(3) This advance interest tax shall not be credited to the separate account of any employer. It shall be levied and collected in the same manner as contributions and shall be subject to the same penalty and interest, collection, impoundment, priority, lien, certificate of assessment, and assessment provisions and procedures set forth in §§ 11-10-716 — 11-10-722.

(b)(1) Receipts from this advance interest tax and any penalty and interest collected on overdue advance interest taxes shall be deposited into the Unemployment Compensation Fund Clearing Account.

(2) At least once each month, deposits that have been established as advance interest tax payments and any interest and penalty payments applicable to the advance interest payments shall be paid over to the Treasurer of State and credited by the Treasurer of State to the Employment Security Advance Interest Trust Fund created and established in the State Treasury.

(3) All income from investment of the Employment Security Advance Interest Trust Fund shall be deposited and credited to that Employment Security Advance Interest Trust Fund.

(4) All withdrawals shall be upon voucher warrants issued, or caused to be issued, by the Director of the Department of Workforce Services as authorized by legislative appropriation and, except as otherwise provided herein, shall be used only for the purpose of:

(A) Paying interest incurred by the state on advances obtained from the federal Unemployment Trust Fund under Title XII of the Social Security Act;

(B) Making refunds of the aforementioned advance interest tax and interest and penalty payments attributed to the advance interest tax which were erroneously paid; and

(C) Returning moneys to the Unemployment Compensation Fund Clearing Account that may have been incorrectly identified and erroneously transferred to the Employment Security Advance Interest Trust Fund in the State Treasury.

(c)(1) On November 10 of each calendar year, the director shall transfer all assets of the Employment Security Advance Interest Trust Fund, which exceed five million dollars (\$5,000,000) to the Unemployment Compensation Fund, § 11-10-801, provided that the state has no interest-bearing advances obtained from the federal Unemployment Trust Fund under Title XII of the Social Security Act outstanding.

(2) Notwithstanding any other provision of this section, all income from investment of the Employment Security Advance Interest Trust Fund earned during calendar years 1995 and 1996 shall be deposited and credited to the Department of Workforce Services Special Fund, § 19-5-984, as set out in § 11-10-716.

(d) Any interest required to be paid on advances obtained by the state under Title XII of the Social Security Act shall be paid in a timely manner and shall not be paid directly or indirectly by an equivalent reduction in unemployment contributions or taxes imposed under other provisions of §§ 11-10-701 — 11-10-715 or otherwise from amounts in the Unemployment Compensation Fund established under § 11-10-801 et seq.

(e) The director shall promulgate such regulations as are necessary to carry out the provisions of this section.

History. Acts 1941, No. 391, § 7; 1963, No. 93, § 9; 1971, No. 35, §§ 11-13; 1973, No. 329, §§ 10, 11; 1973, No. 350, §§ 2, 3; 1983, No. 482, § 29; 1985, No. 8, § 10; 1985, No. 9, § 10; A.S.A. 1947, § 81-1108;

Acts 1991, No. 100, § 42; 1993, No. 6, § 16; 1995, No. 519, § 9.

U.S. Code. Title XII of the Social Security Act is codified as 42 U.S.C. § 1321 et seq.

11-10-709. Wages and employment.

(a) For the purposes of §§ 11-10-701 and 11-10-702, wages shall not include that part of remuneration paid to an individual by an employer or the employer's predecessor with respect to the employment during any calendar year which exceeds that part of remuneration paid specified in § 11-10-215(a)(1), unless that part of the remuneration is subject to a tax under a federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund.

(b) For the purposes of this section, the term "employment" shall include service constituting employment under any unemployment compensation law of another state.

History. Acts 1941, No. 391, § 7; 1963, No. 93, § 9; 1971, No. 35, § 14; 1975 (Extended Sess., 1976), No. 1083, § 9; 1977, No. 366, § 9; 1981, No. 43, § 14; 1983, No. 482, § 30; A.S.A. 1947, § 81-1108; reen. Acts 1987, No. 672, § 8; Acts 1989, No. 420, § 12.

A.C.R.C. Notes. This section was reen-

acted by Acts 1987, No. 672, § 8. Acts 1987, No. 834 provided that 1987 legislation reenacting acts passed in the 1976 Extended Session should not repeal any other 1987 legislation and that such other legislation would be controlling in the event of conflict.

CASE NOTES

Cited: Arkansas Employment Sec. Div. Inc., 275 Ark. 374, 630 S.W.2d 31 (Ark. v. National Baptist Convention U.S.A., 1982).

11-10-710. Transfer of experience.

(a)(1) Unless otherwise provided in § 11-10-723, any employing unit that acquires the organization, trade, and all of the places of business and substantially all of the assets of any employer, excepting, in any such case, any assets retained by the employer incident to the liquidation of the employer's obligations, whether or not the acquiring employing unit was an employing unit within the meaning of § 11-10-208 prior

to the acquisition, and that continues the organization, trade, or business as indicated by retaining the predecessor employer's three-digit, North American Industry Classification System Code, shall assume the predecessor employer's actual contributions, regular benefit experience, annual payrolls, liability for current or delinquent contributions, interest, penalty, and otherwise as if no change with respect to the separate account, actual experience, and payrolls or the position of the predecessor employer otherwise had occurred and as if the operations of the predecessor employer had at all times been carried on by the successor employing unit.

(2) The separate account of the predecessor employer shall be transferred by the Director of the Department of Workforce Services to the successor employing unit and, as of the date of the acquisition, shall become the separate account or part of the separate account, as the case may be, of the successor employing unit, and the regular benefits thereafter chargeable to the predecessor employer on account of employment prior to the date of the acquisition shall be charged to the separate account of the successor employing unit.

(b)(1) However, unless otherwise provided in § 11-10-723, if any employing unit acquires a segregable and identifiable portion of the business of any employer, whether the acquiring employing unit was an employing unit within the meaning of § 11-10-208 prior to the acquisition, and whether the acquisition is the result of reorganization, purchase, inheritance, receivership, or for any other cause, and if the successor employing unit desires to obtain any benefit of the predecessor employer's experience, the successor employing unit must file with the director a petition, signed by all interested parties, within thirty (30) days after the acquisition setting out the percentage of the predecessor employer's actual contributions, regular benefit experience, annual payrolls, payment of contributions, and otherwise that should be transferred to the successor employing unit's separate account.

(2)(A) If the director finds the facts substantially as represented in the petition and that all contributions due by the successor employing unit have been paid, he or she shall transfer the proportionate share of the predecessor employer's separate account to the successor employing unit.

(B) Effective the date of the acquisition, the account transferred under subdivision (b)(2)(A) of this section shall become the separate account or part of the separate account, as the case may be, of the successor employing unit as if no change with respect to the proportionate share of the separate account had occurred.

(c)(1) Following a transfer as described in subsection (a) or (b) of this section, the contribution rate of the successor employing unit shall be determined as follows:

(A) If the successor employing unit is an employer as defined in § 11-10-209 at the time of the transfer and has been assigned a contribution rate pursuant to the provisions of this section, the successor employing unit shall continue to pay contributions at the

previously assigned contribution rate through the end of the rate year;

(B) If the successor employing unit is not an employer as defined in § 11-10-209 at the time of the transfer and acquires the business of one (1) employer or the businesses of two (2) or more employers with the same contribution rate, the successor employing unit shall pay contributions at the contribution rate assigned to the predecessor employer or employers from the date the transfer occurred through the end of the rate year; and

(C) If the successor employing unit is not an employer as defined in § 11-10-209 at the time of the transfer and simultaneously acquires the businesses of two (2) or more employers with different rates of contributions, the successor employing unit's contribution rate from the date the transfer occurred through the end of the rate year shall be computed on the combined experience of the predecessor employers as of the regular computation date for the rate year in which the transfer occurred.

(2)(A) From and after the end of the rate year in which the transfer occurred, the successor employing unit's rate of contribution for each rate year following the transfer shall be based on the successor employing unit's experience combined with the experience of the predecessor employer or employers as of the regular computation date for the rate year.

(B) However, if at the regular computation date the successor employing unit and the predecessor employer or employers have less than three (3) years of benefit risk as defined in § 11-10-707(d):

(i) The contribution rate shall be the new employer contribution rate as set forth in § 11-10-704(b)(1); and

(ii) The three (3) years of benefit risk shall be calculated using the established new employer calculation date of the successor employing unit or the calculation date of the predecessor employer or employers, whichever date is the earliest.

(d)(1)(A) The director shall give notice of the determination he or she makes under subsection (a) or (b) of this section to the predecessor employer unless the predecessor employer has consented to the transfer of experience and to the successor employing unit.

(B) The notice shall become conclusive and binding upon each employing unit unless, within twenty (20) days after the mailing date of the notice to the employing unit's last known mailing address, an application for review and redetermination is filed with the director setting forth the employing unit's reasons for seeking a review and redetermination.

(2)(A)(i)(a) The director may deny the application if he or she finds the reasons set forth by the employing unit making application for review and redetermination are insufficient to change his or her determination.

(b) Otherwise, the application for review and redetermination shall be granted, and the director shall make a redetermination.

(ii) The director may issue a redetermination within one (1) year of the original determination if, through his or her own investigation, he or she finds the original determination to be in error.

(B) The director shall promptly notify the parties to the review and redetermination of his or her decision by mailing the denial of redetermination to their last known addresses.

(C) The denial of an application for review and redetermination is final and conclusive as of the mailing date of the director's notification.

(3) A party to a review and redetermination under subdivision (d)(2) of this section may appeal from the determination or redetermination of the director by filing a petition with the clerk of the circuit court in the county of the party's residence, if the residence is in Arkansas, or the clerk of the Pulaski County Circuit Court, Arkansas, within thirty (30) days of the mailing date of the director's notice of determination or redetermination.

History. Acts 1941, No. 391, § 7; 1943, No. 256, § 1; 1945, No. 8, § 1; 1947, No. 398, § 7; 1949, No. 155, § 11; 1953, No. 162, § 14; 1955, No. 395, § 26; 1959, No. 32, § 1; 1963, No. 93, § 9; 1971, No. 35, § 14; 1985, No. 8, § 11; 1985, No. 9, § 11; A.S.A. 1947, § 81-1108; Acts 1991, No. 48, § 9; 1991, No. 100, § 43; 2003, No. 1223,

§ 12; 2005, No. 902, § 10; 2007, No. 490, § 14.

A.C.R.C. Notes. The term "chancery court" in this section was changed to "circuit court" in light of the 2001 enactment of Ark. Const. Amend. 80.

Publisher's Notes. This section may be affected by § 11-10-723.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of Legislation, 2003 Arkansas General As-

sembly, Labor Law, Employment Security Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS

Delegation of Authority.
Hearings.
Timely Notification.
Transfer.

Delegation of Authority.

The General Assembly has not delegated taxing authority to predecessor firms; the tax rate for new employers is fixed by legislative enactment. *Gill v. Arkansas Emp. Sec. Div.*, 306 Ark. 164, 812 S.W.2d 114 (1991).

Hearings.

Subdivision (b)(1) does not contemplate hearings on experience transfers. *Gill v. Arkansas Emp. Sec. Div.*, 306 Ark. 164, 812 S.W.2d 114 (1991).

Timely Notification.

Circuit court properly concluded that a predecessor employer had not received the requisite notice of the Arkansas Employment Security Department's original determination until November 2003 because the annual notices of the rate of contribution that were sent to the successor employer under § 11-10-707(c) were not notices of a determination under subdivision (d)(1) of this section. *Williams v. Wayne Farms, LLC*, 368 Ark. 93, 243 S.W.3d 316 (2006).

Where a corporation provided timely notification to the Employment Security Division, but two days after the expiration of the period filed an additional form supplied by the agency, the corporation substantially complied with the notice provisions and was entitled to the

unemployment contribution rate of the predecessor firm. *Hayes v. Ward Ice Cream Co.*, 258 Ark. 309, 523 S.W.2d 923 (1975) (decision under prior law).

Transfer.

A transfer of the experience between employers must necessarily precede the filing of the petition signed by all interested parties under (b)(1). *Gill v. Arkansas Emp. Sec. Div.*, 306 Ark. 164, 812 S.W.2d 114 (1991).

Substantial compliance with (b)(1) is sufficient for the transfer of a predecessor's experience. *Gill v. Arkansas Emp. Sec. Div.*, 306 Ark. 164, 812 S.W.2d 114 (1991).

Circuit court did not err in concluding that the Arkansas Employment Security Department was aware it was dealing with the acquisition of a business that required a determination under this section where the status report submitted by employer reflected that either a partial or complete transfer of assets had occurred. *Williams v. Wayne Farms, LLC*, 368 Ark. 93, 243 S.W.3d 316 (2006).

Cited: *Arkansas Employment Sec. Div. v. National Baptist Convention U.S.A., Inc.*, 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982).

11-10-711. Temporary closing of business because of absence in armed forces.

(a) Notwithstanding any inconsistent provisions of this chapter, if the Director of the Department of Workforce Services finds that an employer's business was closed solely because of the entrance of one (1) or more of the owners, officers, partners, or the majority stockholder into the armed forces of the United States or any of its allies, or of the United Nations after December 31, 1949, the employer's account shall, for experience rating purposes, not be considered as terminated. If the business is resumed by the employer within one (1) year after the discharge or release of the person from active duty in the armed forces, the employer's experience shall be deemed to have been continuous through the closed period.

(b) The employer's reserve ratio after returning from military duty shall be the ratio of the employer's reserve, including regular benefits paid to any individual during the period the employer was in the armed forces, to the average of the employer's annual payrolls for the three (3) or five (5) most recent calendar years for which the employer has reported taxable wages, whichever average is the lesser.

(c) However, successorship provisions shall apply to this account only if the business has been resumed by the employer.

History. Acts 1941, No. 391, § 7; 1943, No. 135, § 1; 1943, No. 138, §§ 11-13; 1943, No. 256, § 1; 1945, No. 8, § 1; 1947, No. 398, §§ 6, 7; 1949, No. 155, §§ 8-11; 1953, No. 162, § 15; 1963, No. 93, § 9; 1971, No. 35, § 14; A.S.A. 1947, § 81-1108.

CASE NOTES

Cited: *Arkansas Employment Sec. Div. v. National Baptist Convention U.S.A., Inc.*, 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982).

11-10-712. Employer ceasing to pay wages.

(a) Whenever an employer has paid no wages for a period of twelve (12) consecutive calendar quarters following the latest calendar quarter that the employer paid wages in employment, the Director of the Department of Workforce Services shall terminate the employer's experience rating account and shall destroy the records of the account.

(b) In the event an employer subsequently becomes subject to this chapter after the employer's experience rating account has been so terminated, the employer must again meet the requirements of §§ 11-10-703 — 11-10-708.

History. Acts 1941, No. 391, § 7; 1959, 35, § 14; 1983, No. 482, §§ 25-30; A.S.A. No. 238, § 1; 1963, No. 93, § 9; 1971, No. 1947, § 81-1108.

CASE NOTES

Cited: Arkansas Employment Sec. Div. Inc., 275 Ark. 374, 630 S.W.2d 31 (Ark. v. National Baptist Convention U.S.A., 1982).

11-10-713. Employees of nonprofit organizations and governmental entities.

(a) Benefits paid to individuals based on wages paid by any nonprofit organization or government employing unit shall be financed in accordance with this section.

(b) As used in this section and § 11-10-714:

(1) A "government employing unit" is one for which service in employment as defined in § 11-10-210(a)(2) is performed; and

(2) A "nonprofit organization" is an organization for which service in employment as defined in § 11-10-210(a)(3) is performed and which is exempt from income tax under section 501(a) of the Internal Revenue Code of 1954;

(3) "Wages" are not limited by any amount specified in § 11-10-215.

(c)(1) Any nonprofit organization or government employing unit which, pursuant to § 11-10-210(a)(2) or (3), is subject to this chapter shall pay contributions under § 11-10-701 unless it elects, in accordance with this subsection, to pay to the Director of the Department of Workforce Services for the Unemployment Compensation Fund an amount equal to the amount of regular benefits and, to the extent that the fund is not reimbursed for the extended benefits in accordance with section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, the extended benefits paid, based on wages paid by the employer to individuals for weeks of unemployment that begin during the effective period of the election.

(2) Any nonprofit organization or government employing unit that is or becomes subject to this chapter may elect to become liable for payments in lieu of contributions for a period of not less than one (1) calendar year, provided that it files with the director a written notice of its election within the thirty-day period immediately following the date it becomes subject to this chapter.

(3) Any nonprofit organization or any government employing unit that makes an election in accordance with subdivision (c)(2) of this section shall continue to be liable for payments in lieu of contributions until it files with the director a written notice terminating its election not later than thirty (30) days prior to the beginning of the calendar year for which the termination shall first be effective.

(4)(A) Any nonprofit organization or any government employing unit that has been paying contributions under this chapter for a period subsequent to January 1, 1972, may change to a reimbursable basis by filing with the director not later than thirty (30) days prior to the beginning of any calendar year a written notice of election to become liable for payments in lieu of contributions.

(B) The election shall not be terminable by the employer for that and the next calendar year.

(5)(A) The director may, for good cause, extend the period within which a notice of election, or a notice of termination, must be filed.

(B) He or she may permit an election to be retroactive for a period not to begin earlier than the first day of the current calendar year.

(6)(A) The director, in accordance with such regulations as he or she may prescribe, shall notify each employer filing an election notice of any determination that he or she may make under this section and of the effective date or the termination date of the election.

(B) The determinations shall be subject to reconsideration, appeal, and review in accordance with § 11-10-308.

(7) Any nonprofit organization or any government employing unit that elects to make payments in lieu of contributions into the fund as provided in this subsection shall not be liable to make payments with respect to the benefits paid to any individual whose base-period wages include wages for previously uncovered services as defined in § 11-10-507(5)(C) to the extent that the fund is reimbursed for benefits pursuant to § 121 of Pub. L. No. 94-566.

(d)(1) At the end of each calendar quarter, the director shall, except as otherwise may be provided in subsection (e) of this section, bill each employer that has elected to make payments in lieu of contributions for an amount equal to the full amount of the regular benefits and, to the extent that the fund is not reimbursed for the extended benefits in accordance with section 204 of the Federal-State Extended Unemployment Compensation Act of 1970 the extended benefits paid to individuals during the calendar quarter that are based on wages paid by the employer.

(2)(A) The amount due specified in any bill from the director shall be conclusive and binding on the employer unless, not later than thirty (30) days after the bill was mailed to the employer's last known address or was otherwise delivered, the employer files an application for redetermination by the director.

(B) The director shall promptly review and reconsider the amount due specified in the bill and shall issue a redetermination in any case in which the application for redetermination has been filed.

(C) Any redetermination shall be conclusive and binding unless, not later than thirty (30) days after the redetermination was mailed to the employer's last known address or was otherwise delivered, the employer appeals the redetermination of the director by filing a petition with the clerk of the circuit court in the county of the employer's residence, if the residence is in Arkansas, or the clerk of the Pulaski County Circuit Court, Arkansas.

(3) Payment of any bill rendered under subdivision (d)(1) of this section shall be made not later than thirty (30) days after the bill was mailed to the last known address of the employer or was otherwise delivered to the employer unless there has been an application for review and redetermination in accordance with subdivision (d)(2) of this section.

(4) Payments made by any employer under this section shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the employer.

(5)(A) Past due payments of amounts in lieu of contributions shall be subject to the same interest and penalties that, pursuant to §§ 11-10-716 — 11-10-722, apply to past due contributions.

(B) Also, unpaid amounts in lieu of contributions are subject to the same assessment and civil action and other collection provisions of this chapter as apply to unpaid contributions.

(C) Furthermore, the provisions of this chapter which provide for the adjustment or refund of contributions shall apply to the adjustment or refund of payments in lieu of contributions.

(D) Any goods, chattels, moneys, or credits belonging to a private nonprofit employer or political subdivision of this state or any instrumentality of one (1) or more states or political subdivisions and that is in the hands or possession of the State of Arkansas shall be subject to levy or garnishment as provided by law for the satisfaction of any past due payments in lieu of contributions of the employer.

(e) Payments in lieu of contributions shall be made in accordance with the following provisions:

(1)(A) Each state government employing unit for which services as defined in § 11-10-210(a)(2)(A) are performed and that is liable for payments in lieu of contributions shall, at the end of each calendar quarter, pay to the director an amount equal to the full amount of regular benefits, and to the extent that the fund is not reimbursed for the extended benefits in accordance with section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, the extended benefits paid to individuals based on wages paid by the state government employing unit regardless of the source of funds from which the wages are paid.

(B) The benefits shall be financed by appropriation of funds by the General Assembly.

(C) The Department of Workforce Services shall bill and the Chief Fiscal Officer of the State shall promptly reimburse the department for such benefit payments in accordance with subsection (d) of this section;

(2)(A)(i) Each private nonprofit employer and each government employing unit for which services as defined in § 11-10-210(a)(2)(B) are performed and that has elected to make payment in lieu of contributions shall, for calendar quarters beginning on and after January 1, 1979, pay such amount as the employer may estimate to be the amount of regular benefits and one-half ($\frac{1}{2}$) of the extended benefits, except that government employing units shall include all of the extended benefits expected to be paid to individuals based on wages paid by the employer during the period.

(ii)(a) The payments shall be made on or before the tenth day of the first month of each calendar quarter.

(b) The percentage used to determine the amount of quarterly payment due under this subdivision (e)(2) shall be determined by the director and shall be based on the average quarterly benefit cost of each employer during the fiscal year ending on June 30 of the immediately preceding calendar year.

(c) If any employer subject to this subdivision (e)(2) did not have wages in an immediately preceding fiscal year, the director shall determine the average quarterly wages to be used in determining the amount of quarterly payment to be made in the current year by the employer. The determination shall be based on that portion of the fiscal year during which wages were paid.

(B) On December 31 of each calendar year or as soon thereafter as possible, the director shall determine whether the total amount of payments made for the year by the employer is less than or in excess of the total amount of benefit payments chargeable to the employer under this section. Each employer whose total payments for the year were less than the amount so determined shall be liable for payment of the unpaid balance and shall pay the amount due within thirty (30) days after the date on which the director shall mail to the employer a notice of the amount. If the total payment exceeds the amount so determined for the calendar year, all or a part of the excess may, at the option of the employer, be refunded to the employer or retained as part payment against future payments.

(C) If benefits paid to an individual are based on wages paid by one (1) or more employers that are liable for payments in lieu of contributions and on wages paid by one (1) or more employers who are liable for contributions or by two (2) or more employers that are liable for payments in lieu of contributions, the amount of benefits payable by each employer that is liable for payments in lieu of contributions shall be an amount which bears the same ratio to the total benefits paid to the individual as the total base-period wages paid to the individual by the employer bears to the total base-period wages paid to the individual by all of his or her base-period employers.

(f) If any employer is delinquent in making any payments in lieu of contributions as required under this section, the director may terminate the employer's election to make payments in lieu of contributions

as of the beginning of the next calendar year, and the termination shall be effective for that and the next calendar year.

(g)(1)(A) Two (2) or more employers that have become liable for payments in lieu of contributions in accordance with subsection (c) of this section may file a joint application to the director for the establishment of a group account for the purpose of sharing the cost of benefits that are attributable to service in the employ of the employers.

(B) Each application shall identify and authorize a group representative to act as the group's agent for the purposes of this subsection.

(2) Upon his or her approval of the application, the director shall establish a group account for the employers effective as of the beginning of the calendar quarter in which he or she receives the application and shall notify the group's representative of the effective date of the account. The account shall remain in effect for not less than one (1) calendar year and thereafter until terminated at the discretion of the director or upon application by the group.

(3) Upon establishment of the account, each member of the group shall be liable for payments in lieu of contributions with respect to each calendar quarter in the amount that bears the same ratio to the total benefits paid in that quarter that are attributable to service performed in the employ of all members of the group as the total wages paid for service in employment by the member in that quarter bears to the total wages paid during the quarter for service performed in the employ of all members of the group.

(4) The director shall prescribe such regulations as he or she deems necessary with respect to applications for establishment, maintenance, and termination of group accounts that are authorized by this subsection, for addition of new members to, and withdrawal of active members from, the accounts, and for the determination of the amounts that are payable under this subsection by members of the group and the time and manner of the payments.

History. Acts 1941, No. 391, § 7; 1963, No. 93, § 9; 1971, No. 35, § 15; 1977, No. 376, § 13; 1979, No. 492, § 10; 1979, No. 922, § 10; 1981, No. 43, § 15; 1985, No. 8, §§ 12, 13; 1985, No. 9, §§ 12, 13; A.S.A. 1947, § 81-1108; Acts 1987, No. 753, § 17; 1991, No. 100, § 44; 2007, No. 490, § 15.

A.C.R.C. Notes. Subdivision (d)(2) of this section was amended by Acts 1987, No. 753, § 17, which made no change in

the language of the subdivision.

U.S. Code. Section 501(a) of the Internal Revenue Code of 1954 referred to in this section is codified as 26 U.S.C. § 501(a). Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970 is codified as 26 U.S.C. § 3304. Section 121 of Public Law 94-566 is codified as a note under 26 U.S.C. § 3304.

CASE NOTES

Cited: Arkansas Employment Sec. Div. Inc., 275 Ark. 374, 630 S.W.2d 31 (Ark. v. National Baptist Convention U.S.A., 1982).

11-10-714. Exception — Reimbursable payments.

Notwithstanding any provisions in § 11-10-713, any nonprofit organization, state hospital, state institution of higher education, or group of such employers that, prior to January 1, 1969, paid contributions required by § 11-10-701, and, pursuant to § 11-10-713, elected by March 5, 1971, to make payments in lieu of contributions, shall not be required to make any payment on account of any regular or extended benefits paid, on the basis of wages paid by such nonprofit organization, state hospital, state institution of higher education, or group of such employers to individuals for weeks of unemployment that begin on or after the effective date of the election until the total amount of the benefits equals the amount of the positive balance in the experience rating account of the nonprofit organization, state hospital, state institution of higher education, or group of such employers.

History. Acts 1941, No. 391, § 7; 1963, No. 93, § 9; 1971, No. 35, § 15; A.S.A. 1947, § 81-1108.

CASE NOTES

Cited: Arkansas Employment Sec. Div. Inc., 275 Ark. 374, 630 S.W.2d 31 (Ark. v. National Baptist Convention U.S.A., 1982).

11-10-715. Employers' nonliability.

(a) Notwithstanding any other provisions of this chapter, no employer shall be liable for payments in lieu of contributions with respect to extended benefit payments which are wholly reimbursed to the state by the federal government.

(b) Notwithstanding any other provision of this or any other section of this chapter, if that portion of § 115 of Pub. L. No. 94-566, 90 Stat. 2667 which requires unemployment insurance coverage of services performed by individuals employed by municipal or county governments or local public school districts is adjudged unconstitutional or invalid in its application or stayed pendente lite by a court of competent jurisdiction, then no employer contribution shall be payable by municipal or county governments or local public school districts, provided that their employees are covered by the Special Unemployment Assistance Act of 1974, Pub. L. No. 93-567, or similar federal law providing coverage for such employees.

History. Acts 1941, No. 391, §§ 2, 7; 1963, No. 93, § 9; 1975, No. 609, § 7; 1977 (Ex. Sess.), No. 6, § 1; A.S.A. 1947, §§ 81-1103, 81-1108.

U.S. Code. Section 115 of Public Law 94-566, 90 Stat. 2667 referred to in this

section is codified as 26 U.S.C. §§ 3304, 3306, and 3309. The Special Unemployment Assistance Act of 1974, Public Law 93-567, is codified as a note under 26 U.S.C. § 3304.

CASE NOTES

Cited: Thornbrough v. Gage, 234 Ark. 15, 350 S.W.2d 306 (1961); Garrett v. Cline, 257 Ark. 829, 520 S.W.2d 281 (1975); Arkansas Employment Sec. Div. v. National Baptist Convention U.S.A., Inc., 275 Ark. 374, 630 S.W.2d 31 (Ark. 1982); Hirschy v. Everett, 8 Ark. App. 174, 649 S.W.2d 412 (1983); Barker v. Stiles, 9 Ark. App. 273, 658 S.W.2d 416 (1983); Stiles v. Hopkins, 282 Ark. 207, 666 S.W.2d 703 (1984).

11-10-716. Collection — Interest on past due contributions.

(a)(1) If contributions are not paid on the date on which they are due and payable as prescribed by the Director of the Department of Workforce Services, the whole or part thereafter remaining unpaid shall bear interest at the rate of one and one-half percent (1.5%) per month from and after the due date until payment is received by the director.

(2) In computing interest for any period less than a full month, the rate shall be five-hundredths of a percent (.05%) for each day or fraction thereof.

(3) The date as of which payment of contributions, if mailed, is deemed to have been received may be determined by such regulations as the director may prescribe.

(b)(1)(A) At the end of each month, deposits in the Unemployment Compensation Fund Clearing Account which have been established as interest and penalty payments collected pursuant to §§ 11-10-716 — 11-10-723 shall be paid over to the Treasurer of State and credited by him or her to the Department of Workforce Services Special Fund, § 19-5-984, created and established in the State Treasury.

(B) All withdrawals shall be upon voucher warrants issued, or caused to be issued, by the director for any one (1) or more of the following purposes as authorized by legislative appropriation:

(i) Refunds of the interest and penalties erroneously paid;
(ii) Replacements of money lost or erroneously expended, as provided by § 11-10-322; and

(iii) Such other and additional purposes necessary to the proper administration of this chapter as specifically provided in the appropriation for the Department of Workforce Services.

(2) Funds received as a result of the application of funds withdrawn from the fund pursuant to and in accordance with the withdrawal purposes and provisions set forth in this subsection shall also be deposited into and credited to the fund.

History. Acts 1941, No. 391, § 14; A.S.A. 1947, § 81-1117; Acts 1991, No. 1965, No. 33, § 2; 1977, No. 376, § 16; 100, § 45; 1993, No. 403, § 3; 2005, No. 1979, No. 492, § 13; 1979, No. 922, § 13; 21, § 1; 2005, No. 902, § 11. 1985, No. 8, § 26; 1985, No. 9, § 26;

11-10-717. Collection — Failure to pay or report — Penalty.

(a)(1)(A) If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due may be collected by civil action in the name of the Director of the Department of Workforce Services.

(B) The employer adjudged in default shall pay the costs of the action, including reasonable attorney's fees for prosecution of the action.

(2) Civil actions brought under §§ 11-10-716 — 11-10-723 to collect contributions or interest from an employer shall be heard by the court at the earliest possible date and shall be entitled to preference upon the calendar of the court over all other civil actions except petitions for judicial review under this chapter and cases arising under the Workers' Compensation Law, § 11-9-101 et seq.

(3)(A) The courts of this state shall, in like manner, entertain actions to collect contributions or interest for which liability has accrued under the unemployment compensation law of any other state or of the federal government.

(B) No suit, including an action for a declaratory judgment, shall be maintained and no writ or process shall be issued by any court of this state that has the purpose or effect of restraining, delaying, or forestalling the collection of any contributions under this chapter or substituting any collection procedure for those prescribed in this chapter.

(b)(1) There may be assessed by the director against employers who do not file their reports in the time prescribed by the director a penalty of ten dollars (\$10.00) or five percent (5%) of the contributions due on the report, whichever is the greater, if the report is filed within twenty (20) days after its due date.

(2) A penalty of twenty dollars (\$20.00) or ten percent (10%) of the contributions due on the report, whichever is the greater, may be assessed on reports filed in excess of twenty (20) days after their due date.

(3) A penalty of thirty dollars (\$30.00) or fifteen percent (15%) of the contributions due on the report, whichever is the greater, shall be assessed when:

(A) The employer has failed to supply all information, including, but not limited to, employee wage information, employee social security number, and a separate accounting of seasonal worker wages within and without the normal seasonal period of operations, directed by regulations prescribed by the director;

(B) The director deems it necessary to estimate wage information;
or

(C) A subpoena must be used to obtain wage information.

(c)(1)(A) The courts of this state shall recognize and enforce liability for unemployment contributions, penalties, interest, benefit overpayments, court costs, and reasonable attorney's fees imposed by other states that extend a like comity to this state.

(B) The director is empowered to effect collection of unemployment contributions, penalties, interest, benefit overpayments, court costs, and reasonable attorney's fees due the Department of Workforce Services in any jurisdiction that extends such comity.

(C) In no instance shall this state or any other state exceed the collection procedures as provided by the laws of the state in which collections are effected.

(2) In any case, the director may, as agent for and on behalf of any other state, institute and conduct legal action to collect contributions, penalties, interest, benefit overpayments, court costs, and reasonable attorney's fees under a foreign judgment for states that extend comity to this state.

(3)(A) A certificate by the requesting state attesting the authority of the official to collect contributions, penalties, interest, benefit overpayments, court costs, and reasonable attorney's fees shall be conclusive evidence of the authority.

(B) The requesting state shall pay all court and related costs incurred.

(d) Notwithstanding any other provisions of this chapter, any employer or any individual, organization, partnership, corporation, or other legal entity engaging, in any way, in contract construction activity and subcontracting out any part of that activity shall be liable for any unpaid contributions, interest, and penalties due from the subcontracting employer to the extent that the contributions, interest, and penalties accrue and are attributable to that part of his, her, or its work subcontracted to the subcontracting employer.

(e)(1)(A) Notwithstanding any other provisions of this chapter, any employer or any individual, organization, partnership, corporation, or other legal entity that meets the definition of "lessor employing unit" as set forth in subdivision (e)(4) of this section shall be liable for contributions on wages paid by the lessor employing unit to individuals performing services for client lessees of the lessor employing unit.

(B) Unless the lessor employing unit has timely complied with the provisions of subdivision (e)(2) of this section, any employer, individual, organization, partnership, corporation, or other legal entity leasing employees from any lessor employing unit shall be jointly and severally liable for any unpaid contributions, interest, and penalties due under this chapter from any lessor employing unit attributable to wages for services performed for the client lessee entity by employees leased to the client lessee entity.

(C) Beginning on or after January 1, 1998, the lessor employer shall keep separate records and submit separate quarterly contribution and wage reports for each of its client lessee entities using the client lessee's account number and unemployment contribution rate.

(2)(A)(i)(a) In order to relieve client lessees from joint and several liability and the separate reporting requirements imposed under subdivision (e)(1) of this section, any lessor employing unit as defined in subdivision (e)(4) of this section may post and maintain a surety

bond issued by a corporate surety authorized to do business in Arkansas in the amount of one hundred thousand dollars (\$100,000) to ensure prompt payment of contributions, interest, and penalties for which the lessor employing unit may be or becomes liable under this chapter.

(b) For the period beginning on or after January 1, 1998, through June 30, 2005, a bonded lessor employing unit shall report all clients' wages on the lessor employing unit's quarterly contribution and wage report using its contribution rate, account number, and federal identification number.

(c)(1) Quarterly contribution and wage reports for all clients obtained by bonded lessor employing units on or after July 1, 2005, shall be reported in accordance with subdivision (e)(1)(C) of this section for three (3) consecutive years.

(2) After reporting client wages for three (3) consecutive years as required by subdivision (e)(2)(A)(i)(c)(1) of this section, a bonded lessor employing unit shall report client wages on the lessor employing unit's quarterly contribution and wage report using the lessor employing unit's contribution rate, account number, and federal identification number.

(ii) If after three (3) years, throughout which the lessor employing unit as defined in subdivision (e)(4) of this section has paid all contributions due in a timely manner, the bond shall be reduced to thirty-five thousand dollars (\$35,000) and shall remain at thirty-five thousand dollars (\$35,000) so long as the lessor employing unit continues to report and pay all contributions due in a timely manner.

(iii) The employee leasing company is prohibited from moving the wages of a client from one (1) leasing company account to another leasing company account with a lower rate.

(B) In lieu of a surety bond, the lessor employing unit may deposit in a depository designated by the director securities with marketable value equivalent to the amount required for a surety bond. The securities so deposited shall include authorization to the director to sell any such securities in an amount sufficient to pay any contributions which the lessor employing unit fails to promptly pay when due.

(3) Lessor employing units not currently engaged in the business of leasing employees to client lessees shall comply with subdivision (e)(2) of this section before entering into lease agreements with client lessees.

(4) The term "lessor employing unit" is defined as an independently established business entity that engages in the business of providing leased employees to any other employer, individual, organization, partnership, corporation, or other legal entity, referred to herein as a client lessee. Any legal entity determined to be engaged in the business of outsourcing shall be considered a "lessor employing unit" under this section. Additionally, the licensing requirements of the Arkansas Professional Employer Organization Recognition and Licensing Act, § 23-92-401 et seq., as administered by the State Insurance Department must be satisfied.

(5) The provisions of this subsection shall not be applicable to private employment agencies who provide their employees to employers on a temporary help basis, provided that the private employment agencies are liable as employers for the payment of contributions on wages paid to temporary workers so employed.

History. Acts 1941, No. 391, § 14; No. 420, §§ 13, 14; 1991, No. 100, §§ 46, 1965, No. 33, § 2; 1975, No. 609, § 11; 47; 1997, No. 234, § 25; 2003, No. 1223, 1977, No. 376, § 16; 1979, No. 492, § 14; § 13; 2005, No. 902, §§ 12, 13; 2007, No. 1979, No. 922, § 14; A.S.A. 1947, § 81-490, § 16. 1117; Acts 1987, No. 753, §§ 20, 21; 1989,

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of assembly, Labor Law, Employment Security Legislation, 2003 Arkansas General As- Law, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

ANALYSIS

Constitutionality.
Notice.

Constitutionality.

Insofar as this section was, prior to the 1975 amendment, in conflict with constitutional provision authorizing suits for protection against enforcement of illegal exactions, it was invalid. *McCain v. Hammock*, 204 Ark. 163, 161 S.W.2d 192 (1942) (decision prior to 1975 amendment).

Notice.

Evidence of letters written to company and conferences had by Director of Unemployment Compensation Commission with company's owner relative to liability for contributions established that company had notice of assessments. *McKinley v. R.L. Payne & Son Lumber Co.*, 200 Ark. 1114, 143 S.W.2d 38 (1940) (decision under prior law).

Cited: *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958); *In re W. F. Hurley, Inc.*, 612 F.2d 392 (8th Cir. 1980).

11-10-718. Collection — Priorities under legal dissolutions or distributions — Release of liens.

(a)(1) In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition, or similar proceeding, contributions then or thereafter due shall be paid in full prior to all claims except taxes and claims for wages of not more than two hundred fifty dollars (\$250) to each claimant, earned within six (6) months of the commencement of the proceedings.

(2) In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Reform Act of 1978 contributions then or thereafter due shall be entitled to such priority as is provided in § 507 of that act.

(b)(1)(A) If any person liable for the payment of any tax or contributions due under this chapter neglects or refuses to pay the tax or contribution after a demand, the amount, including any interest, penalty, additional amount, or additions to the tax, together with any costs that may accrue in addition thereto, shall be a lien in favor of

the State of Arkansas upon all property and rights to property, whether real or personal, belonging to the person.

(B)(i) The proceedings for enforcing the lien herein provided for shall be brought in the name of the Director of the Department of Workforce Services.

(ii) All liens issued under this chapter by the Director of the Department of Labor shall remain in full force and effect and shall be fully enforceable by the Director of the Department of Workforce Services.

(2) Unless another date is specifically fixed by law, the lien shall arise at the time of the notice of the delinquency to the employer and shall continue until the liability of the amount is satisfied or becomes unenforceable by reason of the statute of limitations as fixed in this chapter.

(3) The lien shall not be valid against any mortgagee, pledgee, purchaser, or judgment creditor until the certificate of assessment provided for in § 11-10-720 has been filed with the clerk of the circuit court of the county wherein the employer domiciles or has a place of business, or suit has been filed by the Director of the Department of Workforce Services in a court of competent jurisdiction under § 11-10-717.

(4) If any person, firm, or corporation shall become delinquent in the payment of any contributions, interest, or penalties required to be paid by this chapter and shall transfer title or ownership of the assets of the business, then the delinquent contributions, interest, or penalties shall be collected by means of a levy against the assets as provided in § 11-10-720.

(c)(1) Upon written application by any person, the Director of the Department of Workforce Services or his or her designee may release from a lien any property or part of the property subject to the lien described in subdivision (b)(1) of this section, provided that:

(A) The Director of the Department of Workforce Services or his or her designee determines at any time that the interest of the Department of Workforce Services has no value; or

(B) The Director of the Department of Workforce Services or his or her designee determines that the lien is clouding the title of the property because of an error in the description of properties or similarity in names.

(2) In determining the value of the interest of the department in the property to be released, the Director of the Department of Workforce Services or his or her designee shall give consideration to the value of the property and to the liens thereon having priority over the lien of the department.

History. Acts 1941, No. 391, § 14; 1953, No. 162, § 18; 1985, No. 8, § 27; 1985, No. 9, § 27; A.S.A. 1947, § 81-1117; Acts 1987, No. 753, § 22; 1991, No. 100, §§ 48, 49.

U.S. Code. Section 507 of the Federal Bankruptcy Act of 1978, referred to in this section, is codified as 11 U.S.C. § 507.

CASE NOTES

Federal Lien.

Where lien of state on realty of debtor was superior in point of time to lien of federal government for taxes and neither state nor federal government undertook to seize the realty or subject it to sale although the realty was sold by agreement to satisfy first mortgage of bank which was superior to both liens, the lien of the state on proceeds of the sale remaining

after satisfaction of the mortgage was superior to the federal government's lien where there was no allegation of insolvency to bring into play the federal priority statute. *Commercial Credit Corp. v. Schwartz*, 130 F. Supp. 524 (E.D. Ark. 1955).

Cited: *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958); *In re W. F. Hurley, Inc.*, 612 F.2d 392 (8th Cir. 1980).

11-10-719. Collection — Refunds.

(a)(1) If not later than three (3) years after the date of payment of any amount as a contribution, interest, or penalty pursuant to this chapter, any employer who has made such a payment makes application for an adjustment thereof in connection with a subsequent contribution, interest, or penalty payment, or for a refund because the adjustment cannot be made, and the Director of the Department of Workforce Services determines that payment of the contribution, interest, or penalty, or any portion thereof, was erroneous, the director may allow the employer to make an adjustment of the amount erroneously paid, without interest, in connection with subsequent contribution, interest, or penalty payments by the employer.

(2) If the adjustment cannot be made, the director may refund, without interest, from the Unemployment Compensation Fund or from the Department of Workforce Services Special Fund, as applicable, the amount erroneously paid.

(b) However, the director shall not allow any adjustment in connection with subsequent contributions for amounts of interest or penalty payments collected on or after July 1, 1965, nor shall he or she refund any payment from the Unemployment Compensation Fund or any account of the Unemployment Compensation Fund, except that he or she may refund any payment from the interest and penalties collected after that date which are in the clearing account pending transfer to the Department of Workforce Services Special Fund.

(c) Refunds of contributions pursuant to § 11-10-210(f)(6) shall be refunded by the director from the fund without application of the provisions of this section.

(d)(1) For like cause and within the same period, adjustment or refund may be so made on the director's own initiative.

(2) In no event shall a refund or adjustment be granted if the director finds that benefit payments have been based on wages payable or paid that have been reported in error.

(e) The director is further authorized, upon proof being submitted satisfactorily to him or her, to allow transfer of payment of contributions so that the paying source shall receive credit for contributions paid.

History. Acts 1941, No. 391, § 14; A.S.A. 1947, § 81-1117; Acts 1997, No. 1943, No. 138, § 31; 1965, No. 33, § 2; 234, § 26.
1971, No. 35, § 18; 1977, No. 376, § 16;

CASE NOTES

Refunds.

Where a company was not liable for unemployment compensation taxes on certain workers, the tax commissioner was not entitled to retain a tax paid under protest. *McCain v. Crossett Lumber Co.*, 206 Ark. 51, 174 S.W.2d 114 (1943).

Circuit court erred in ordering the Arkansas Employment Security Department to immediately refund an employer the erroneously paid unemployment taxes be-

cause subdivision (a)(2) of this section did not allow a refund unless an adjustment could not be made and, in this case, there had been no determination as to whether an adjustment could be made. *Williams v. Wayne Farms, LLC*, 368 Ark. 93, 243 S.W.3d 316 (2006).

Cited: *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958); *In re W. F. Hurley, Inc.*, 612 F.2d 392 (8th Cir. 1980).

11-10-720. Collection — Certificate of assessment.

(a)(1) If any person, firm, or corporation shall become delinquent in the payment of any contribution, interest, or penalties required to be paid by this chapter, it shall be the duty of the Director of the Department of Workforce Services, when the amount of the contribution, interest, and penalties is determined, either by the report of the employer or by such investigations as the director may have made, to assess the contributions, interest, and penalties so determined against the delinquent employer and to certify the amount of the contributions, interest, and penalties and mail or otherwise deliver a copy of the assessment to the delinquent employer.

(2)(A) At the end of ten (10) days thereafter, the assessment shall become prima facie correct, and the director shall certify the amount of the delinquent contributions, interest, and penalties to the clerk of the circuit court of the county wherein the employer is domiciled or has a place of business, and it shall be the duty of the clerk to file the certificate of record and to enter it in the record of the circuit court for judgment and decree under the procedure prescribed for filing transcripts of judgments by § 16-19-1011.

(B) Thereupon, the assessment shall have the force and effect of a judgment of the circuit court and shall bear interest at the rate of ten percent (10%) a year.

(3) Execution shall be issuable, at the request of the director, his or her agent or attorney, or any other employee of the Department of Workforce Services, forthwith by the clerk of the circuit court, directed to the sheriff, who shall make a levy on any property, assets, or effects of the employer against whom the contribution is assessed.

(b) No exemption shall be allowed to the employer from the levy of an execution issued for contributions, interest, and penalties, and no indemnifying bond shall ever be required by the sheriff before making levy.

(c)(1) If any officer to whom any execution, as provided for in this section, shall be delivered shall neglect or refuse to execute or levy it

according to law, or shall take in execution any property, or if any property be delivered to him or her by any person against whom an execution may have been issued, and the officer shall neglect or refuse to make sale of the property so taken or delivered according to law, or if any officer shall not return any execution on or before the return day therein specified, or shall make a false return thereof, then, and in any of the cases aforesaid, the officer shall be liable and bound to pay the whole amount of money in the execution specified, or thereon endorsed and directed to be levied.

(2) It shall be the duty of the clerk of the court from which any execution may be issued to endorse thereon the time when the execution was returned.

(d)(1) An aggrieved employer may have a review of the action of the director in making an assessment for contributions, interest, or penalties, by filing, within ten (10) days after the filing of the assessment with the clerk, a petition for review in the circuit court having jurisdiction.

(2) All actions for review shall have precedence on the docket of the court where filed, and all appeals from the action of any court on the review shall be prosecuted within thirty (30) days after the final order of the court is made.

History. Acts 1941, No. 391, § 14; 1985, No. 9, § 28; A.S.A. 1947, § 81-1117; 1943, No. 138, § 19; 1947, No. 398, § 12; Acts 1991, No. 100, §§ 50, 51; 1977, No. 376, § 16; 1985, No. 8, § 28;

CASE NOTES

ANALYSIS

Appeal.

Assessment Filed.

Jurisdiction of Chancery.

Res Judicata.

Venue.

Appeal.

Where petitioners pleaded as a ground for relief only that they were not employers within the purview of this chapter, they should have appealed to the Board of Review or circuit court pursuant to § 11-10-308 rather than under this section. *Palmer v. Cline*, 254 Ark. 393, 494 S.W.2d 112 (1973).

Assessment Filed.

When under this section an assessment is filed with the circuit clerk, the assessment shall have the force and effect of a judgment and cannot be set aside until there has been a showing of a meritorious defense. *Thornbrough v. Mayner*, 236 Ark. 480, 366 S.W.2d 889 (1963).

Jurisdiction of Chancery.

Chancery court had jurisdiction of suit by employer asking that assessment be cancelled and officials be restrained from attempting to enforce it. *McCain v. Hammock*, 204 Ark. 163, 161 S.W.2d 192 (1942).

Aside from the declaratory judgment statutes, the chancery court had jurisdiction of question to determine whether homestead property is exempt from a judgment for unemployment contributions, interest and penalty assessed pursuant to the provisions of this chapter under its traditional equitable jurisdiction to remove clouds on title to real estate. *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958).

Res Judicata.

Where the chancery court quashed the assessment and expunged it from the record because the assessment had been made without employer's having been afforded a hearing regarding his liability for contributions as an employer, this deter-

mination did not constitute *res judicata* thereby defeating the right of the commissioner to collect the contribution claimed and did not preclude further proceedings against him. *Thornbrough v. Barnhart*, 232 Ark. 862, 340 S.W.2d 569 (1960).

Venue.

Suit to prevent filing of assessment of contributions to unemployment fund and the resulting judgment, lien, and cloud on title of property being not a suit against the state, was properly instituted in the county of plaintiff's residence where its

property was located. *McCain v. Hammock*, 204 Ark. 163, 161 S.W.2d 192 (1942).

Provision pertaining to review by chancery court having jurisdiction showed intent that any chancery court in the state should have jurisdiction to review the acts of the director, depending upon the facts in each case. *McCain v. Hammock*, 204 Ark. 163, 161 S.W.2d 192 (1942).

Cited: *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958); *In re W. F. Hurley, Inc.*, 612 F.2d 392 (8th Cir. 1980).

11-10-721. Collection — Limitation of assessment.

(a) All contributions due under this chapter shall be assessed in the manner provided by this chapter within four (4) years after reports of the contributions have been filed by the employer, and no proceedings in court shall be begun after the expiration of the period, except as otherwise provided in this section.

(b) In the case of a false or fraudulent return with intent to evade tax or a failure to file reports required by this chapter or by the Director of the Department of Workforce Services pursuant to the provisions of this chapter, the tax may be assessed or a proceeding in court for the collection of the tax may be begun at any time.

(c) In case of willful attempt in any manner to defeat or evade tax, the tax may be assessed, or a proceeding in court for the collection of the tax may be begun at any time.

(d) Where the assessment of any contribution required by this chapter has been made within the statutory period of limitation properly applicable thereto, the contribution may be collected by a proceeding in court but only if begun within ten (10) years after the assessment of the contribution except where proceedings are had in court on the assessment within ten (10) years and a judgment of the court is rendered for the contribution. Then the judgment shall have the same force and effect and the limitation shall be the same as other judgments at law under the laws of this state.

(e) The provisions of this chapter shall be applicable in all instances where the limitations set forth in this section have expired under the provisions of this section prior to July 1, 1953.

History. Acts 1941, No. 391, § 14; 1953, No. 162, § 19; 1977, No. 376, § 16; A.S.A. 1947, § 81-1117.

CASE NOTES

Cited: *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958); *In re W. F. Hurley, Inc.*, 612 F.2d 392 (8th Cir. 1980).

11-10-722. Collection — Impoundment.

(a) The Director of the Department of Workforce Services or his or her designated representative may give notice of impoundment of any deposits in any bank or savings and loan institution payable to the order of any employer owing any delinquent contributions, interest, and penalties to which a lien has attached under this chapter. Notice of impoundment shall be served by the director or his or her designated representative by certified mail to the bank or savings and loan institution or by written notice served personally upon its president, vice president, cashier, or assistant cashier.

(b) Any bank or savings and loan institution served with notice of impoundment shall be required to recognize the Department of Workforce Services' lien on any deposit subject thereto by withholding payment of any deposit in an amount not to exceed the amount of the delinquent contributions, interest, and penalty to the depositor or to his or her order for a period not to exceed sixty (60) days.

(c) Any bank or savings and loan institution failing to comply shall be held liable for the amount covered by the notice of impoundment up to the amount on deposit to the employer's credit with the bank or savings and loan institution.

(d)(1) Impoundment of the funds shall be revoked when the lien or judgment has been satisfied and may be revoked at any time at the discretion of the director or his or her designated representative.

(2) Revocation of impoundment shall be served in the same manner as the notice of impoundment.

History. Acts 1941, No. 391, § 14; A.S.A. 1947, § 81-1117; Acts 1991, No. 1975, No. 609, § 12; 1977, No. 376, § 16; 100, § 52; 2003, No. 1223, § 14.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Survey of assembly, Labor Law, Employment Security Legislation, 2003 Arkansas General Assembly, 26 U. Ark. Little Rock L. Rev. 424.

CASE NOTES

Cited: *White v. Thornbrough*, 229 Ark. 96, 313 S.W.2d 384 (1958); *In re W. F. Hurley, Inc.*, 612 F.2d 392 (8th Cir. 1980).

11-10-723. Special rules regarding transfers of experience and assignment of rates.

(a) Notwithstanding any other provision of law, the following shall apply regarding assignment of rates and transfers of experience:

(1) If an employer transfers its trade or business, or a portion thereof, to another employer and, at the time of the transfer, there is any common ownership, management, or control of the two (2) employers, then the unemployment experience attributable to the transferred trade or business, or portion thereof, shall be combined with the

employer to whom the business is transferred. The combining of experience and recalculation of applicable employer tax rates shall be made effective the first day of the calendar quarter following the date of transfer of the trade or business, or portion thereof. The transfer of some or all of an employer's workforce to another employer shall be considered a transfer of trade or business, or portion thereof; and

(2) If following a transfer of experience under subdivision (a)(1) of this section or transfer of experience as otherwise provided in this chapter involving only a portion of a trade or business, the Director of the Department of Workforce Services determines that a substantial purpose of the transfer was to obtain a reduced liability for contributions, then the experience rating accounts of the employers involved shall be combined into a single account and a single rate assigned to such an account effective the first day of the calendar quarter following the date of transfer.

(b) Whenever a person is not an employer under this chapter at the time it acquires the trade or business of an employer, the unemployment experience of the acquired business shall not be transferred to that person if the director finds that that person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions. Instead, that person shall be assigned the new employer rate under this chapter. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the director shall use objective factors that may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long that business enterprise was continued, or whether substantial numbers of new employees were hired for performance of duties unrelated to the business activity conducted prior to acquisition.

(c)(1) Knowing violations or attempted violations of subsection (a) or (b) of this section or any other provision of this subchapter related to determining the assignment of a contribution rate shall result in an additional two-percent rate increase for the rate year during which the violation or attempted violation occurred and a two-percent additional rate increase in each of the following three (3) rate years. In addition to the rate increases, a penalty of ten percent (10%) of total taxes due shall also be assessed in each of these rate years. All penalty amounts shall be deposited and credited to the Department of Workforce Services Special Fund as set out in § 11-10-716. The additional tax and penalty required by this subsection shall not be credited to the separate account of any employer, nor shall any employer whose contribution rate has been affected by this subsection be eligible to make a voluntary payment pursuant to § 11-10-705(c).

(2) If a person knowingly advises another person in a way that results in a violation of subsection (a) or (b) of this section, the person shall be subject to a penalty of five thousand dollars (\$5,000) plus ten percent (10%) of the total taxes due from the person violating subsection (a) or (b) of this section for any rate year in which a violation

occurred. All penalty amounts shall be deposited and credited to the fund as set out in § 11-10-716.

(3) The rate increases and penalties set forth in this subchapter along with any interest that may accrue as a result of these rate increases and penalties shall be in addition to any other rate increases, penalties, and interest provided in this chapter and shall be subject to collection as provided for in §§ 11-10-716 — 11-10-722.

(4) As used in this section, “knowing” and “knowingly” mean having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.

(5) As used in this section, “violations or attempted violations” and “violates or attempts to violate” include, but are not limited to, intent to evade, misrepresentation, or willful nondisclosure.

(6)(A) In addition to the rate increases and penalties imposed by subdivision (c)(1) of this section, any person in violation of this section who knowingly evades or defeats or attempts to evade or defeat the payment of any unemployment insurance tax, penalty, or interest due under this subchapter shall be guilty of a Class C felony.

(B) In addition to the penalties imposed by subdivision (c)(2) of this section, any person who knowingly assists a person in evading or defeating or attempting to evade or defeat the payment of any unemployment insurance tax, penalty, or interest due under this subchapter shall be guilty of a Class C felony.

(d) The director shall establish procedures to identify the transfer or acquisition of a business for purposes of this section.

(e) As used in this section:

(1) “Person” has the meaning given that term by section 7701(a)(1) of the Internal Revenue Code of 1986; and

(2) “Trade or business” shall include the employer’s workforce.

(f) This section shall be interpreted and applied in such a manner as to meet the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor.

(g) If this section and § 11-10-710 could both be applied to a transfer or attempted transfer of experience, this section shall take precedence and be applied to the transfer or attempted transfer.

History. Acts 2005, No. 902, § 14.

to in (e)(1), is codified as 26 U.S.C.

U.S. Code. Section 7701(a)(1) of the Internal Revenue Code of 1986, referred

§ 7701(a)(1).

SUBCHAPTER 8 — UNEMPLOYMENT COMPENSATION FUND

SECTION.

11-10-801. Establishment and control.

11-10-802. Accounts and deposit.

11-10-803. Withdrawals.

SECTION.

11-10-804. Federal Unemployment Trust Fund — Termination.

Preambles. Acts 1969, No. 319, contained a preamble which read: "Whereas, there are funds in the United States Treasury credited from time to time to the account of Arkansas that may be used for administration purposes by the Employment Security Division; and

"Whereas, the Congress of the United States, has by Public Law 90-430 increased the duration of time from ten fiscal years preceding to fifteen fiscal years preceding in which such funds so deposited in the United States Treasury may be drawn on by the State of Arkansas in order that such funds will not be lost for administrative purposes; and

"Whereas, the Congress of the United States has declared that such funds be withdrawn from the United States Treasury after an appropriation bill by the state is passed specifying the purposes and amounts;

"Now, therefore...."

Effective Dates. Acts 1965, No. 33, § 6: June 30, 1965. Emergency clause provided: "It is hereby found and determined by the General Assembly that this Act is immediately necessary in order to obtain satisfaction of certain amounts due the Federal Government in connection with the unemployment compensation program. Therefore, an emergency is hereby declared to exist and this Act being necessary for the preservation of the public peace, health, and safety, shall take effect and be in full force from and after its passage except Section 2 hereof which shall become effective and in full force from and after June 30, 1965."

Acts 1975, No. 609, § 19: Mar. 28, 1975. Emergency clause provided: "It is hereby found and determined by the General Assembly that various provisions of the Arkansas Employment Security Law of the State are in need of immediate clarification and revision in order to provide adequate protection to the working and unemployed citizens of this State and that this Act is immediately necessary to accomplish this purpose. An emergency is, therefore, declared to exist and this Act, being necessary for the immediate preservation of the public peace, health, and safety, shall be in full force and effect from and after the date of its passage and approval."

Acts 1979, No. 492, § 18: Mar. 21, 1979. Emergency clause provided: "It is hereby

found and determined by the General Assembly that in order to clarify certain provisions of the Employment Security Law that may be subject to misinterpretation and in order to bring the said Employment Security Law into conformity with the Federal Unemployment Tax Act as amended by P.L. 94-566, P.L. 95-19, and P.L. 95-216 so that Arkansas employers and workers may receive the benefits of the said Federal Unemployment Tax Act, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety, shall take effect and be in full force and effect from and after its passage and approval."

Acts 1979, No. 922, § 18: Apr. 16, 1979. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to clarify certain provisions of the Employment Security Law that may be subject to misinterpretation and in order to bring the said Employment Security Law into conformity with the Federal Unemployment Tax Act as amended by P.L. 94-566, P.L. 95-19, and P.L. 95-216 so that Arkansas employers and workers may receive the benefits of the said Federal Unemployment Tax Act, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health, and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1983, No. 482, § 41: Mar. 16, 1983. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to conform with P.L. 97-300 and to bring the Arkansas Employment Security Law in conformity with the Federal Unemployment Tax Act as amended by P.L. 97-248 and to insure the future solvency of the unemployment insurance fund so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect from and after its passage and approval."

Acts 1987, No. 753, § 30: July 1, 1987. Emergency clause provided: "It is hereby

found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections to the Shared Work plan provisions which enable employers to avoid layoffs and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared and this Act being necessary for the immediate preservation of the public peace, health and safety shall take effect and be in full force and effect on and after July 1, 1987."

Acts 1991, No. 100, § 58: July 1, 1991. Emergency clause provided: "It is hereby found and determined by the General Assembly that the provisions of this act should become effective at the beginning of the next fiscal year; that the next fiscal year begins on July 1, 1991 and this act may not go into effect until after July 1, 1991 unless an emergency is declared. Therefore, an emergency is hereby declared to exist and this act being necessary for the preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1991."

Acts 1993, No. 6, § 21: Feb. 1, 1993. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and that Arkansas workers may receive unemployment benefits when they are unemployed, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after its passage and approval."

Acts 1995, No. 519, § 14: July 1, 1995. Emergency clause provided: "It is hereby found and determined by the General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is hereby declared to exist and this act being necessary for the immediate preservation of the public peace, health and safety shall be in full force and effect from and after July 1, 1995."

Acts 1997, No. 234, § 32: Feb. 21, 1997. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Employment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 1999, No. 1116, § 19: Apr. 5, 1999. Emergency clause provided: "It is hereby found and determined by the Eighty-second General Assembly that in order to correct certain inequities in the payment and in the denial of benefits to unemployed workers, to make needed technical corrections and to bring the Arkansas Em-

ployment Security Law into conformity with the Federal Unemployment Tax Act, as amended, so that Arkansas employers may continue to receive the tax credits accorded by the Federal Unemployment Tax Act and the Arkansas workers may receive unemployment benefits when they are unemployed. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety

shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto.”

RESEARCH REFERENCES

Am. Jur. 76 Am. Jur. 2d, Unemp. Comp., § 7. **C.J.S.** 81 C.J.S., Soc. Sec., etc., §§ 209, 210.

11-10-801. Establishment and control.

(a) There is established as a special fund, separate and apart from all public moneys or funds of this state, an Unemployment Compensation Fund, which shall be administered by the Director of the Department of Workforce Services exclusively for the purposes of this chapter.

(b) This fund shall consist of:

- (1) All the contributions collected pursuant to this chapter;
- (2) All interest earned upon any money in the fund;
- (3) All property or securities acquired in lieu of contributions or other liabilities to the fund;
- (4) All earnings of such property or securities;
- (5) All moneys recovered on losses sustained by the fund;
- (6) All moneys received from the federal Unemployment Account in the federal Unemployment Trust Fund in accordance with Title XII of the Social Security Act;
- (7) All moneys credited to this state’s account in the federal Unemployment Trust Fund pursuant to § 903 of the Social Security Act;
- (8) All moneys received for the fund from any other source;
- (9) All moneys received from the federal government as reimbursements pursuant to § 204 of the Federal-State Extended Unemployment Compensation Act of 1970; and
- (10) All moneys received from the stabilization tax under § 11-10-706, except the proceeds of § 11-10-706(f).

(c) All moneys in the fund shall be commingled and undivided.

History. Acts 1941, No. 391, § 9; 1947, No. 398, § 9; 1959, No. 142, § 1; 1965, No. 33, § 1; 1973, No. 350, § 4; A.S.A. 1947, § 81-1112; Acts 1997, No. 234, § 27.

U.S. Code. Title XII of the Social Security Act referred to in this section is

codified as 42 U.S.C. § 1321 et seq. Section 903 of the Social Security Act is codified as 42 U.S.C. § 1103. Section 204 of the Federal-State Extended Unemployment Act of 1970 is codified as a note under 26 U.S.C. § 3304.

11-10-802. Accounts and deposit.

(a)(1) The Director of the Department of Workforce Services shall be ex officio treasurer and custodian of the Unemployment Compensation Fund and disbursing officer of the Department of Workforce Services.

(2) The director shall administer the Unemployment Compensation Fund and shall maintain within the Unemployment Compensation Fund three (3) separate accounts:

(A) A clearing account;

(B) An Unemployment Compensation Trust Fund Account; and

(C) A benefit account.

(b)(1)(A) All moneys payable to the Unemployment Compensation Fund, upon receipt by the director, shall be immediately deposited into the clearing account.

(B) All moneys in the clearing account after clearance shall, except as otherwise provided in this section, be deposited immediately with the Secretary of the Treasury of the United States to the credit of the account of this state in the federal Unemployment Trust Fund, established and maintained pursuant to § 904 of the Social Security Act any provisions of law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding.

(C) All moneys received in the clearing account as proceeds of § 11-10-706(f) shall be deposited and credited to the Employment Security Special Fund, § 19-5-984, pursuant to § 11-10-716.

(2) The benefit account shall consist of all moneys requisitioned from this state's account in the federal Unemployment Trust Fund in the United States Treasury.

(3) Except as otherwise provided in this section, moneys in the clearing and benefit accounts may be deposited into any depository bank in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund.

(4) It shall be lawful for any bank to secure such deposit with it by the pledge or escrow of the assets of the bank consisting of bonds, notes, or certificates of indebtedness which are direct obligations of the United States or of this state, and moneys in the clearing and benefit accounts shall not be commingled with other state funds but shall be maintained in separate accounts on books of the depository bank, and collateral pledged for this purpose shall be kept separate and distinct from any collateral pledged to secure other funds of the state.

(c)(1) The director shall furnish bond to the state with a corporate surety thereon, conditioned that he or she will faithfully perform his or her duties of employment and will properly account for all funds received and disbursed by him or her.

(2) The bond shall be executed in the amount prescribed and in accordance with the applicable provisions of Arkansas law which prescribe surety bonds for state officers and employees and for officers and employees of state boards and commissions.

History. Acts 1941, No. 391, § 9; 1959, No. 142, § 1; 1965, No. 33, § 1; 1979, No. 492, § 11; 1979, No. 922, § 11; A.S.A. 1947, § 81-1112; Acts 1991, No. 100, §§ 53, 54; 1997, No. 234, § 28.

A.C.R.C. Notes. The operation of subsection (c) of this section was suspended by adoption of a self-insured fidelity bond program for public officers, officials, and employees, effective July 20, 1987, pursuant to § 21-2-107 et seq. Subsection (c) of

this section may again become effective upon cessation of coverage under that program. See § 21-2-703.

U.S. Code. Section 904 of the Social Security Act referred to in this section is codified as 42 U.S.C. § 1104.

Cross References. Bonds of state, county, and district officers, § 21-2-107.

Self-insured fidelity bond program, § 21-2-701 et seq.

11-10-803. Withdrawals.

(a)(1) Money requisitioned from this state's account in the federal Unemployment Trust Fund shall be used exclusively for the payment of benefits and for refunds from the Unemployment Trust Fund authorized by this chapter, except that money credited to this state's account pursuant to § 903 of the Social Security Act shall be used exclusively as provided in this section. The Director of the Department of Workforce Services shall, from time to time, requisition from the federal Unemployment Trust Fund such amounts not exceeding the amounts standing to this state's account therein as he or she deems necessary for the payment of benefits and refunds for a reasonable future period. Upon receipt thereof, the money shall be deposited in the benefit account.

(2) For payments beginning on and after January 1, 1997, nothing in subdivision (a)(1) of this section shall be construed to prohibit deducting an amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for the withholding of federal individual income tax, if the individual elected to have the deduction made and the deduction was made in accordance with Pub. L. No. 103-465 and under a program approved by the United States Secretary of Labor.

(b) Any balance of money requisitioned from the federal Unemployment Trust Fund that remains in the benefit account after the expiration of the period for which it was requisitioned shall be deducted from estimates for, and utilized in the payment of, benefits and refunds during succeeding periods or, at the discretion of the director, shall be redeposited with the United States Secretary of the Treasury to the credit of the state's account in the federal Unemployment Trust Fund.

(c)(1) Expenditures of money in the benefit account and refunds from the clearing account shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody.

(2) All warrants issued for the payment of benefits and refunds shall bear the signature of the director or his or her duly authorized agent for that purpose.

(d)(1) Money credited to the account of this state in the federal Unemployment Trust Fund by the Secretary of the Treasury pursuant to § 903 of the Social Security Act may not be requisitioned from this state's account or used except for the payment of benefits and for the

payment of expenses incurred for the administration of this chapter. However, the money may not be used for Job Training Partnership Act [repealed] programs and activities. The money may be requisitioned pursuant to the provisions of this chapter for the payment of benefits. The money may also be requisitioned and used for the payment of expenses incurred in the administration of this chapter. The money may be used only pursuant to a specific appropriation by the General Assembly and only if the expenses are incurred and the money is requisitioned after the enactment of an appropriation law that:

(A) Specifies the purposes for which money is appropriated and the amounts appropriated therefor;

(B) Limits the period within which the money may be obligated to a period ending not more than two (2) years after the date of the enactment of the appropriation law;

(C) Limits the amount which may be obligated to an amount that does not exceed the amount by which the aggregate of the amounts transferred to the account of this state pursuant to § 903 of the Social Security Act exceeds the aggregate of the amounts used by this state pursuant to this chapter and charged against the amounts transferred to the account of this state; and

(D) Notwithstanding subdivisions (d)(1)(A)-(C) of this section, moneys credited with respect to federal fiscal years 1999, 2000, and 2001 shall be used solely for the administration of the unemployment compensation program or in a manner allowable by the enabling legislation.

(2) Any amount credited to the state's account under § 903 of the Social Security Act that has been appropriated for expenses of administration, whether or not withdrawn from the trust fund, shall be excluded from the Unemployment Compensation Fund balance for the purpose of determining solvency of the fund and for experience rating purposes.

(3)(A) Money appropriated as provided in this section for the payment of expenses of administration shall be requisitioned as needed for the payment of obligations incurred under the appropriation and, upon requisition, shall be deposited in the Employment Security Administration Fund, § 11-10-320, from which the payments shall be made.

(B) Money so deposited shall, until expended, remain a part of the Unemployment Compensation Fund and, if it will not be expended, shall be returned promptly to the account of this state in the federal Unemployment Trust Fund.

History. Acts 1941, No. 391, § 9; 1947, § 31; A.S.A. 1947, § 81-1112; Acts 1987, No. 398, § 9; 1959, No. 142, § 1; 1965, No. No. 753, § 18; 1993, No. 6, § 17; 1995, No. 33, § 1; 1969, No. 319, § 1; 1973, No. 350, 519, § 10; 1995, No. 1296, § 42; 1999, No. § 4; 1975, No. 609, § 8; 1983, No. 482, 1116, § 15.

U.S. Code. Section 903 of the Social Security Act referred to in this section is codified as 42 U.S.C. § 1103.

The Job Training Partnership Act, referred to in this section, is codified as 18 U.S.C. § 665, 29 U.S.C. §§ 49, 801-999 [repealed], 1501 et seq. [repealed], 1601 et seq. [repealed], 1701 et seq., and 42 U.S. §§ 602, 632 [repealed], 633 [repealed].

Public Law 103-465, as it relates to social security, is codified as 42 U.S.C. § 503; Public Law 103-465, as it relates to employees' compensation, is codified as 29 U.S.C. §§ 1021, 1053-1056, 1082, 1103, 1108, 1132, 1301, 1303, 1305, 1306, 1310, 1311 [repealed], 1322, 1343, 1346, and 1350.

11-10-804. Federal Unemployment Trust Fund — Termination.

- (a) The provisions of this subchapter, to the extent that they relate to the federal Unemployment Trust Fund, shall be operative only so long as the federal Unemployment Trust Fund continues to exist and so long as the Secretary of the Treasury of the United States continues to maintain for this state a separate book account of all funds deposited therein by this state for benefit purposes, together with this state's proportionate share of the earnings of the federal Unemployment Trust Fund, from which no other state is permitted to make withdrawals.
- (b)(1) If and when the federal Unemployment Trust Fund ceases to exist, or such separate book account is no longer maintained, all moneys, properties, and securities belonging to the Unemployment Compensation Fund of this state shall be administered by the Director of the Department of Workforce Services as a trust fund for the purpose of paying benefits under this chapter.
- (2)(A) The director shall have authority to hold, invest, transfer, sell, deposit, and release the moneys and any properties, securities, or earnings acquired as an incident to the administration.
- (B) The moneys shall be invested in readily marketable classes of securities, bonds, or other interest-bearing obligations of the United States or secured as to both interest and principal by the United States.
- (C) The investments shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits.

History. Acts 1941, No. 391, § 9; 1965, No. 33, § 1; A.S.A. 1947, § 81-1112.

SUBCHAPTER 9 — DIVISION OF STATE NEW HIRE REGISTRY

SECTION.	Enforcement of child support obligations — Confidentiality.
11-10-901. Creation — Administrator — Authority.	
11-10-902. Reporting requirements —	

A.C.R.C. Notes. References to “this chapter” in subchapters 1-8 may not apply to this subchapter which was enacted subsequently.

Effective Dates. Acts 1997, No. 1276, § 6: Apr. 9, 1997. Emergency clause pro-

vided: "It is found and determined by the General Assembly of the State of Arkansas that this act creates the Division of State New Hire Registry within the Arkansas Employment Security Department; that the Division is to compile a state registry of newly-hired and returning employees as required by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193); and that to provide for the effective administration of this act, it should become effectively immediately. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the

veto is overridden, it shall become effective on the date the last house overrides the veto."

Acts 2009, No. 802, § 14: Apr. 3, 2009. Emergency clause provided: "It is found and determined by the General Assembly of the State of Arkansas that this act should go into effect as soon as possible in order to assure the prompt determination of claims for unemployment benefits and the continued provision of benefits and services to eligible persons. Therefore, an emergency is declared to exist and this act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto."

11-10-901. Creation — Administrator — Authority.

(a)(1) The Director of the Department of Workforce Services is assigned responsibility for the administration of the State New Hire Registry.

(2) The director shall hire an administrator of the State New Hire Registry who shall serve at the pleasure of the director.

(b)(1) The administrator shall compile a state registry of newly hired and returning employees as required by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193.

(2) The director may enter into such professional services contracts as may be necessary to assist in the development and operation of the State New Hire Registry.

(c) The director shall enter into agreements with other state and federal agencies as may be necessary to properly administer and carry out the requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, to ensure confidentiality of data and reimbursement for any costs associated with meeting the requirements of this subchapter and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193.

History. Acts 1997, No. 1276, § 1; 2009, No. 802, § 12.

U.S. Code. The Personal Responsibility and Work Opportunity Reconciliation

Act of 1996, Pub. L. 104-193, referred to in this section is codified primarily as 8 U.S.C. § 1611 et seq. and 42 U.S.C. § 601 et seq.

11-10-902. Reporting requirements — Enforcement of child support obligations — Confidentiality.

(a) As used in this section:

(1) “Administrator” means the administrator of the State New Hire Registry;

(2) “Employee” means an individual who is an employee as defined in Chapter 24 of the Internal Revenue Code of 1986 but does not include an employee of a federal or state agency performing intelligence or counterintelligence operations if the head of the agency has determined that reporting pursuant to subsection (b) of this section could endanger the safety of the employee or could compromise an ongoing operation or investigation;

(3) “Employer” means an employer as that term is defined in § 3401(d) of the Internal Revenue Code of 1986 and includes any labor organization and any governmental entity; and

(4) “Labor organization” means a labor organization as that term is defined in § 2(5) of the National Labor Relations Act and includes any entity, sometimes known as a “hiring hall”, that is used by the labor organization and an employer to carry out the requirements listed in § 8(f)(3) of the federal act of an agreement between the organization and the employer.

(b)(1) The administrator shall compile an automated state registry of newly hired and returning employees.

(2) An employer shall report electronically or in any manner authorized by the Department of Workforce Services for inclusion in the State New Hire Registry whenever an employee is newly hired or returns to work.

(3) An employer shall include in each report the name, address, and social security number of the employee and the name, address, and federal taxpayer identification number of the employer.

(4) An employer shall make the report by submitting a copy of Internal Revenue Service Form W-4 for the employee or an equivalent form. An employer may transmit the report by first class mail, magnetically, or electronically. If an employer makes the report by mail, the reporting date is that of the postmark. The report shall be received not later than twenty (20) days after the date the employer hires the employee or, in the case of an employer transmitting reports magnetically or electronically, by two (2) monthly transmissions, if necessary, not less than twelve (12) days nor more than sixteen (16) days apart.

(5) An employer that has employees employed in two (2) or more states and transmits reports magnetically or electronically may comply with the reporting requirements of this section by designating one (1) state in which the employer has employees and to which the employer will transmit the report required by this section. Any employer that transmits reports shall notify the Secretary of the Department of Health and Human Services in writing as to which state the employer designates for the purpose of sending reports.

(c)(1) Information reported pursuant to this section shall be entered into the State New Hire Registry database maintained by the Department of Workforce Services or its designated contractor within five (5) business days of receipt from an employer. As used herein, "business day" means a day on which state offices are open for regular business.

(2) Within two (2) business days after the date information regarding a newly hired employee is entered into the State New Hire Registry, the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration shall transmit a notice to the employer directing the employer to withhold from the income of the employee an amount equal to the monthly or other periodic child support obligation, including any past due child support obligation, of the employee.

(3) Within three (3) business days after the date information regarding a newly hired employee is entered into the State New Hire Registry, the Department of Workforce Services or its designated contractor shall furnish the information to the National Directory of New Hires.

(4) On a quarterly basis, the State New Hire Registry shall furnish to the National Directory of New Hires extracts of reporting required to be made to the Secretary of Labor concerning the wages and unemployment compensation paid to individuals by such dates, in such format, and containing such information as the Secretary of the Department of Health and Human Services shall specify in regulations.

(5)(A) The Department of Human Services shall have access to information reported by employers pursuant to this section for the purpose of verifying eligibility for programs pursuant to 42 U.S.C. § 1320b-7.

(B) The Department of Workforce Services shall have access to information reported by employers pursuant to this section for purposes of administering the Department of Workforce Services' programs.

(C) The Workers' Compensation Commission shall have access to information reported by employers pursuant to this section for purposes of administering the workers' compensation programs.

(d)(1) The Department of Workforce Services shall directly or by contract conduct automated comparisons of the social security numbers reported by employers and the social security numbers appearing within records of the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration for cases being enforced under the Title IV — D State Plan.

(2) When an information comparison reveals a match with respect to the social security number of an individual required to provide child support under a support order, the State New Hire Registry shall immediately provide the Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration with the name, address, and social security number of the employee to whom the social security number is assigned and the name, address, and federal employer identification number of the employer.

(e) The Office of Child Support Enforcement of the Revenue Division of the Department of Finance and Administration shall use information received pursuant to subsection (d) of this section to locate individuals for purposes of establishing paternity and establishing, modifying, and enforcing child support obligations and may disclose that information to its agents under contract for purposes connected to the administration of the Title IV-D Child Support Program.

(f) All information gathered and maintained by the State New Hire Registry:

(1) Shall be held confidential and be utilized solely for the purposes authorized in this section; and

(2) Is an exception to the open public record requirements of the Freedom of Information Act of 1967, § 25-19-101 et seq.

(g) To the maximum extent allowable, all expenses associated with the development and operation of the State New Hire Registry shall be reimbursed through available funding under the Title IV-D Child Support Program.

History. Acts 1997, No. 1276, § 2; 2009, No. 802, § 13.

U.S. Code. Chapter 24 of the Internal Revenue Code of 1986, referred to in this section, is codified as 26 U.S.C. § 3401 et seq., and § 3401(d) of the Internal Revenue Code is codified as 26 U.S.C.

§ 3401(d). Section 2 of the National Labor Relations Act is codified as 29 U.S.C. § 152. The reference to Title IV-D is a reference to Title IV-D of the Social Security Act, which is codified as 42 U.S.C. § 651 et seq.

SUBCHAPTER 10 — UNEMPLOYMENT TRUST FUND FINANCING ACT OF 2011

SECTION.

- 11-10-1001. Title.
- 11-10-1002. Legislative findings and intent.
- 11-10-1003. Definitions.
- 11-10-1004. Authorization — Purposes.
- 11-10-1005. Governor’s proclamation.
- 11-10-1006. Election.
- 11-10-1007. Procedure for issuing Arkansas Unemployment Trust Fund Bonds.
- 11-10-1008. Terms of bonds.
- 11-10-1009. Sale of bonds.
- 11-10-1010. Employment of professionals.

SECTION.

- 11-10-1011. Sources of repayment.
- 11-10-1012. Investment of proceeds.
- 11-10-1013. Refunding bonds.
- 11-10-1014. Liability.
- 11-10-1015. Tax exemption.
- 11-10-1016. Bonds — Rights and liabilities — Enforcement.
- 11-10-1017. Unemployment obligation assessment.
- 11-10-1018. Department of Workforce Services — Bond Financing Trust Fund.

Effective Dates. Acts 2011, No. 1125, § 2: Apr. 4, 2011. Emergency clause provided: “It is found and determined by the General Assembly of the State of Arkansas that the state’s unemployment trust fund faces higher claim levels and longer benefit durations; that the state is in debt

to the federal government for unemployment funds paid to citizens of this state; and that this act is immediately necessary because the state needs to create a revenue stream to begin to pay off the debt to the federal government. Therefore, an emergency is declared to exist, and this

act being immediately necessary for the preservation of the public peace, health, and safety shall become effective on: (1) The date of its approval by the Governor; (2) If the bill is neither approved nor vetoed by the Governor, the expiration of

the period of time during which the Governor may veto the bill; or (3) If the bill is vetoed by the Governor and the veto is overridden, the date the last house overrides the veto.”

11-10-1001. Title.

This subchapter shall be known and cited as the “Unemployment Trust Fund Financing Act of 2011”.

History. Acts 2011, No. 1125, § 1.

11-10-1002. Legislative findings and intent.

The General Assembly finds that:

(1) With a recession or economic slowdown now underway, the state’s unemployment trust fund faces higher claims levels and longer benefit durations that accompany any economic downturn;

(2) The Arkansas Unemployment Trust Fund:

(A) Provides partial wage replacement to workers who find themselves out of work;

(B) Provides economic stability for a community when major unemployment occurs; and

(C) Encourages workers to remain in the community and to be available for work recalls by employers;

(3) The state is in debt to the federal government for unemployment funds paid to citizens of the State of Arkansas; and

(4) The bonds should be payable from revenues raised by an unemployment obligation assessment.

History. Acts 2011, No. 1125, § 1.

11-10-1003. Definitions.

As used in this subchapter:

(1) “Authority” means the Arkansas Development Finance Authority;

(2) “Bonds” means the “Arkansas Unemployment Trust Fund Bonds”, as authorized in this subchapter;

(3) “Debt service” means all amounts required for the payment of principal, interest, and premium, if any, due with respect to the bonds in any fiscal year along with all associated costs, including the fees and costs of paying agents and trustees, remarketing agent fees, credit enhancement costs, and other amounts necessary in connection with the bonds;

(4) “Designated revenues” means revenues derived from the unemployment obligation assessment under § 11-10-1017;

(5) “Employer” means the same as under § 11-10-209;

(6) “Federal interest rate” means at the time an issue of bonds is sold, the weighted average interest rate charged on advances from the federal trust fund under Title XII of the Social Security Act; and

(7) “Federal Unemployment Trust Fund debt” means the principal and interest on advances from the federal trust fund under Title XII of the Social Security Act, 42 U.S.C. § 1321, as it existed on January 1, 2011.

History. Acts 2011, No. 1125, § 1.

11-10-1004. Authorization — Purposes.

(a) The Arkansas Development Finance Authority is authorized, subject to the approval of the voters in a statewide election, to issue bonds to be known as the Arkansas Unemployment Trust Fund Bonds in an aggregate principal amount not to exceed five hundred million dollars (\$500,000,000).

(b) The purpose of the bond issuance shall be to:

(1) Repay the principal of and interest on advances from the federal trust fund under Title XII of the Social Security Act, 42 U.S.C. § 1321;

(2) Pay the costs of issuance of the bonds including without limitation the costs of bond insurance or other credit enhancement;

(3) Pay unemployment benefits by depositing bond proceeds into the Unemployment Compensation Fund;

(4) Provide a debt service reserve; and

(5) Pay capitalized interest on the bonds for a period not to exceed two (2) years.

History. Acts 2011, No. 1125, § 1.

11-10-1005. Governor’s proclamation.

(a) The Arkansas Development Finance Authority shall prepare and distribute to the Governor a report that shall contain a plan for repaying the federal Unemployment Trust Fund debt and the estimated time and cost to repay the debt.

(b) Upon receipt of the report described in subsection (a) of this section, the Governor shall, if the Governor deems it to be in the public interest, by proclamation call an election on the question of issuing the bonds.

History. Acts 2011, No. 1125, § 1.

11-10-1006. Election.

(a)(1) Arkansas Unemployment Trust Fund Bonds shall not be issued under this subchapter unless the issuance of bonds has been approved by a majority of the qualified electors of the state voting on

the question at a statewide election called by proclamation of the Governor as provided under § 11-10-1005.

(2)(A) An election under this section may be in conjunction with a general election, or it may be a special election.

(B) A special election held under this section shall occur on the second Tuesday of any month, except as otherwise provided for in this subsection.

(C) A special election that is held in months in which a presidential preferential primary election, preferential primary election, general primary election, or general election is scheduled to occur shall be held on the date of the presidential preferential primary election, preferential primary election, general primary election, or general election.

(D)(i) If a special election is held on the date of the presidential preferential primary election, preferential primary election, or general primary election, the issue or issues to be voted upon at the special election shall be included on the ballot of each political party.

(ii) However, separate ballots containing only the issue or issues to be voted upon at the special election shall be prepared and made available to voters requesting a separate ballot.

(iii) A voter shall not be required to vote in a political party's presidential preferential primary election, preferential primary election, or general primary election in order to be able to vote in the special election.

(E) Special elections scheduled to occur in a month in which the second Tuesday is a legal holiday shall be held on the third Tuesday of the month.

(b)(1) Notice of the election shall be:

(A) Published by the Secretary of State in a newspaper of general circulation in the state at least thirty (30) days prior to the election; and

(B) Mailed to each county board of election commissioners and the sheriff of each county at least sixty (60) days prior to the election.

(2) The notice of election shall state that the election is to be held for the purpose of submitting to the people the following proposition in substantially the following form:

“Authorizing the Arkansas Development Finance Authority to issue Arkansas Unemployment Trust Fund Bonds (the ‘Bonds’) in a total principal amount not to exceed five hundred million dollars (\$500,000,000). If approved, the bonds may be issued in one (1) or more series for the purpose of repaying the principal of and interest on advances from the federal trust fund under Title XII of the Social Security Act, 42 U.S.C. § 1321, paying the costs of issuance of the bonds including without limitation the costs of bond insurance or other credit enhancement, paying unemployment benefits by depositing bond proceeds into the Unemployment Compensation Fund, providing a debt service reserve, and paying capitalized interest on the bonds for a period not to exceed two (2) years.

The bonds shall be payable from certain designated revenues. Under the Unemployment Trust Fund Financing Act of 2011, (‘the Bond Act’), the bonds will be repaid from an unemployment obligation assessment imposed on employers. The bonds shall be issued under the authority of and the terms set forth in the Bond Act.

The unemployment obligation assessment shall be based on the aggregate principal amount of bonds issued for nonrefunding purposes and shall be determined by multiplying the employer’s contribution rate in effect on the date that the Governor issues a proclamation calling an election on the issuance of the bonds for employers with accounts as of such date and the employer’s contribution rate as of the employer’s liability date for employers establishing accounts after the date of the proclamation by:

- (a) 25% if the aggregate principal amount of bonds issued is \$350,000,000 or less;
- (b) 30% if the aggregate principal amount of bonds issued is \$350,000,001 to \$400,000,000;
- (c) 33.5% if the aggregate principal amount of bonds issued is \$400,000,001 to \$450,000,000; and
- (d) 37.5% if the aggregate principal amount of bonds issued is \$450,000,001 to \$500,000,000.”

(c) The ballot title shall be “Issuance of Arkansas Unemployment Trust Fund Bonds, and levy and pledge of an unemployment obligation assessment”. On each ballot there shall be printed the title, the proposition set forth in subdivision (b)(2) of this section, and the following:

“FOR issuance of Arkansas Unemployment Trust Fund Bonds in an amount not to exceed \$500,000,000, and levy and pledge of an unemployment obligation assessment[]”

“AGAINST issuance of Arkansas Unemployment Trust Fund Bonds in an amount not to exceed \$500,000,000, and levy and pledge of an unemployment obligation assessment[]”

(d) The notice and ballot shall contain a definition of “employer’s contribution rate” as described in §§ 11-10-704 and 11-10-705.

(e)(1) Each county board of election commissioners shall hold and conduct the election and may take any action with respect to the appointment of election officials and other matters as required by the laws of the state.

(2)(A) The vote shall be canvassed and the result of the vote declared in each county by the board.

(B) Within ten (10) days after the date of the election, the results shall be certified by the boards to the Secretary of State, who shall tabulate all returns received and certify to the Governor the total vote for and against the proposition submitted pursuant to this subchapter.

(f)(1) The result of the election shall be proclaimed by the Governor by the publication of a proclamation one (1) time in a newspaper of general circulation in the State of Arkansas.

(2) The results as proclaimed shall be conclusive unless a complaint challenging the proclaimed results is filed in Pulaski County Circuit Court within thirty (30) days after the date of the publication.

(g)(1) If a majority of the qualified electors voting on the proposition vote in favor of the proposition, the Arkansas Development Finance Authority shall proceed with the issuance of the bonds in the manner and on the terms set forth in this subchapter.

(2) If a majority of the qualified electors voting on the proposition vote against the issuance of the bonds, the Arkansas Development Finance Authority shall have no authority to issue bonds.

(h) Subsequent elections may be called by the Governor if the proposition fails, but each such subsequent election may be held no earlier than six (6) months after the date of the preceding election.

History. Acts 2011, No. 1125, § 1.

11-10-1007. Procedure for issuing Arkansas Unemployment Trust Fund Bonds.

(a) Prior to the issuance of Arkansas Unemployment Trust Fund Bonds, the Arkansas Development Finance Authority shall adopt a resolution authorizing the issuance of the bonds.

(b) Each resolution adopted under this section shall contain the terms, covenants, and conditions as are deemed desirable and consistent with this subchapter, including without limitation those pertaining to:

(1) The establishment and maintenance of funds and accounts;

(2) The deposit and investment of the bond proceeds; and

(3) The rights and obligations of the state, its officers and officials, the Arkansas Development Finance Authority, and the registered owners of the bonds.

(c)(1) The resolutions of the Arkansas Development Finance Authority may provide for the execution and delivery by the Arkansas Development Finance Authority of a trust indenture or trust indentures, with one (1) or more banks or trust companies located within or without the state, containing any of the terms, covenants, and conditions required under subsection (b) of this section and any other terms and conditions deemed necessary by the Arkansas Development Finance Authority.

(2) The trust indenture or trust indentures shall be binding upon the Arkansas Development Finance Authority and the state, and their respective officers and officials.

History. Acts 2011, No. 1125, § 1.

11-10-1008. Terms of bonds.

The Arkansas Unemployment Trust Fund Bonds are subject to the following terms and conditions:

(1)(A) The bonds may be issued in more than one (1) series in an amount sufficient to accomplish the purposes of this subchapter.

(B) The respective series of bonds shall be designated by the year in which the bonds are issued.

(C) If one (1) or more series of bonds is to be issued in a particular year, the series shall be designated alphabetically;

(2)(A) The bonds shall have the date or dates as the Arkansas Development Finance Authority determines.

(B) The bonds shall mature or be subject to mandatory sinking fund redemption over a period ending not later than twelve (12) years after the date of issue of the bonds.

(C) Refunding bonds issued under § 11-10-1013 shall mature or be subject to mandatory sinking fund redemption over a period not ending later than twelve (12) years after the date of issue of the original bonds;

(3)(A) The bonds shall bear interest at the rate or rates determined by the Arkansas Development Finance Authority at the sale of the bonds.

(B) The bonds may bear interest at either a fixed or a variable rate or may be convertible from one (1) interest rate mode to another.

(C) The interest shall be payable at the times as the Arkansas Development Finance Authority shall determine.

(D) The true interest cost of an issue of bonds after taking into account original issue discount and premium and underwriter's discount shall not exceed the federal interest rate;

(4) The bonds shall be issued in the form of bonds registered as to both principal and interest without coupons;

(5) The Arkansas Development Finance Authority shall determine:

(A) The denominations of the bonds;

(B) Whether the bonds may be made exchangeable for bonds of another form or denomination bearing the same rate of interest;

(C) When the bonds may be made payable and the places within or without the state where the bonds may be payable;

(D) Whether the bonds may be made subject to redemption prior to maturity and the manner of and prices for redemption; and

(E) Any other terms and conditions; and

(6)(A) Each bond shall be executed with the facsimile or manual signatures of the Chair and Secretary of the Arkansas Development Finance Authority and shall have affixed or imprinted thereon the seal of the state.

(B) Delivery of the bonds executed shall be valid notwithstanding any change in the persons holding the offices occurring after the bonds have been executed.

11-10-1009. Sale of bonds.

(a) The Arkansas Unemployment Trust Fund Bonds may be sold in any manner, either at private or public sale, and upon terms as the Arkansas Development Finance Authority shall determine to be reasonable and expedient for effecting the purposes of this subchapter.

(b)(1) If the bonds are to be sold at public sale, the Arkansas Development Finance Authority shall give notice of the offering of the bonds in a manner reasonably designed to notify participants in the public finance industry that such offering is being made.

(2) The Arkansas Development Finance Authority shall set the terms and conditions of bidding, including the basis on which the winning bid will be selected.

(c) The Arkansas Development Finance Authority may structure the sale of bonds utilizing financing techniques that are recommended by the Arkansas Development Finance Authority's professional advisors in order to take advantage of market conditions and obtain the most favorable interest rates consistent with the purposes of this subchapter.

(d) The Arkansas Development Finance Authority may enter into any ancillary agreements in connection with the sale of the bonds as the Arkansas Development Finance Authority deems necessary and advisable, including without limitation bond purchase agreements, remarketing agreements, and letter of credit and reimbursement agreements.

History. Acts 2011, No. 1125, § 1.

11-10-1010. Employment of professionals.

Under § 15-5-212, the Arkansas Development Finance Authority may employ and retain any professionals that the Arkansas Development Finance Authority deems necessary to accomplish the issuance and sale of the Arkansas Unemployment Trust Fund Bonds, including without limitation legal counsel, financial advisors, underwriters, trustees, paying agents, and remarketing agents.

History. Acts 2011, No. 1125, § 1.

11-10-1011. Sources of repayment.

(a) The Arkansas Unemployment Trust Fund Bonds shall be payable from the designated revenues.

(b)(1) The unemployment obligation assessment shall be collected until the end of the quarter immediately following the repayment of all bonds authorized under this subchapter.

(2) The unemployment obligation assessment shall not be collected until the qualified voters of the state approve the issuance of bonds under this subchapter.

(c)(1) In order to secure the payment of debt service, any trust instrument, resolution, or other document for the security for the bondholders may provide for the payment of the designated revenues

directly into a trust fund or to a paying agent for the payment of debt service on the bonds.

(2) It is not necessary for the funds to be deposited into the State Treasury.

(d) Designated revenues remaining after the payment of scheduled debt service on the bonds in any year shall be used to redeem or purchase outstanding bonds.

History. Acts 2011, No. 1125, § 1.

11-10-1012. Investment of proceeds.

(a) Proceeds from the sale of the bonds shall be deposited into trust funds or accounts established under the resolution or trust indenture authorizing or securing the bonds to accomplish the purposes of this subchapter in amounts or portions as set forth in the resolution or trust indenture securing the bonds.

(b)(1) The holder of the trust funds shall establish separate accounts for the bonds.

(2) In addition and under the resolution or trust indenture authorizing or securing the bonds, there may be created other funds, accounts, or subaccounts as the Arkansas Development Finance Authority may determine to be necessary or desirable to accomplish the purposes of this subchapter.

(c) All procedures and methods for application of proceeds of the bonds shall be developed in consultation with the Arkansas Development Finance Authority, set forth in the resolution or trust indenture authorizing or securing the bonds, and maintained as part of the records of the Arkansas Development Finance Authority.

(d) The holder and administrator of funds, composed, in whole or in part, of proceeds of bonds or disbursement from funds established under this subchapter, shall be required by appropriate provision of the resolution or trust indenture authorizing or securing the bonds issued to assist the Arkansas Development Finance Authority in preparing any report related to the bonds that may be required by this subchapter or other applicable federal or state law.

(e) Proceeds from the sale of the bonds and any money held in any funds created under or authorized by this subchapter may be invested and reinvested in accordance with the resolution or trust indenture authorizing or securing the bonds issued and shall be invested by or at the direction of the Arkansas Development Finance Authority to the fullest extent practicable pending disbursement for the purposes intended in any of the following:

(1) Direct obligations of the United States, including obligations issued or held in book entry form on the books of the United States Department of the Treasury, or obligations the principal of and interest on which are unconditionally guaranteed by the United States;

(2) Bonds, debentures, notes, or other evidences of indebtedness issued or guaranteed by any United States government agency if the obligations are backed by the full faith and credit of the United States;

(3) Nonfull-faith and credit senior debt obligations issued or guaranteed by United States government agencies;

(4) Money market funds investing exclusively in the investments described in subdivisions (e)(1)–(3) of this section;

(5)(A) Certificates of deposit providing for deposits secured at all times by collateral described in subdivisions (e)(1)–(3) of this section.

(B) The certificates must be issued by commercial bank deposits that are insured by the Federal Deposit Insurance Corporation and collateral of which must be held by a third party.

(C) The holder of the trust funds must have a perfected first security interest in the collateral;

(6) Certificates of deposit, savings accounts, deposit accounts, or money market deposits, all of which are fully insured by the Federal Deposit Insurance Corporation;

(7) Bonds or notes issued by the State of Arkansas, any municipality, county, or school district in the state or by any agency or instrumentality of the state;

(8) Investment agreements with financial institutions or insurance companies that are rated in one (1) of the two (2) highest-rating categories of a nationally recognized rating agency;

(9)(A) Repurchase agreements providing for the transfer of securities from a dealer bank or securities firm to the holder of the trust funds and the transfer of cash from the holder of the trust funds to the dealer bank or securities firm with an agreement that the dealer bank or securities firm will repay the cash plus a yield to the holder of the trust funds in exchange for the securities at a specified date.

(B) Repurchase agreements shall satisfy the following criteria:

(i) Repurchase agreements must be between the holder of the trust funds and a dealer bank or securities firm described as follows:

(a) Dealers with at least one hundred million dollars (\$100,000,000) in capital; or

(b) Banks whose deposits are insured by the Federal Deposit Insurance Corporation; and

(ii) The written repurchase agreement contract must include the following:

(a) Securities that are acceptable for transfer are those listed in subdivisions (e)(1)–(3) of this section;

(b) The term of the repurchase agreement may not exceed thirty (30) calendar days;

(c) The collateral must be delivered to the holder of the trust funds, a trustee if a trustee is not supplying the collateral, or a third party acting as agent for the trustee if the trustee is supplying the collateral before or simultaneously with payment; and

(d)(1) The securities must be valued weekly, marked-to-market at current market price plus accrued interest.

(2)(A) The value of collateral must be equal to one hundred three percent (103%) of the amount of cash transferred by the holder of the trust funds to the dealer bank or security firm under the repurchase agreement plus accrued interest.

(B) If the value of securities held as collateral declines below one hundred three percent (103%) of the value of the cash transferred by the holder of the trust funds, then additional cash or acceptable securities, or both, must be transferred and held by the holder of the trust funds; and

(10) Any other investment authorized by law.

History. Acts 2011, No. 1125, § 1.

11-10-1013. Refunding bonds.

(a) The Arkansas Development Finance Authority may issue the Arkansas Unemployment Trust Fund Bonds for the purpose of refunding bonds previously issued under this subchapter if the total amount of bonds outstanding after the refunding is completed does not exceed the total amount authorized by this subchapter.

(b)(1) To the extent that refunding bonds are issued and the principal amount of the refunding bonds is not in a greater principal amount than the outstanding principal amount of the bonds being refunded, the principal amount of the refunding bonds shall not be subject to the five-hundred-million-dollar limit.

(2) If the refunding bonds are issued in a greater principal amount than the bonds being refunded, the principal amount of the refunding bonds shall not count against the five-hundred-million-dollar limit so long as the aggregate debt service on the refunding bonds is less than the aggregate debt service on the bonds being refunded.

History. Acts 2011, No. 1125, § 1.

11-10-1014. Liability.

Officers, officials, employees, and members of the Board of Directors of the Arkansas Development Finance Authority are not liable personally for any reason arising from the issuance of bonds under this subchapter unless he or she acts with corrupt intent.

History. Acts 2011, No. 1125, § 1.

11-10-1015. Tax exemption.

(a) All Arkansas Unemployment Trust Fund Bonds issued under this subchapter and interest on the bonds shall be exempt from all taxes of the State of Arkansas, including income, inheritance, and property taxes.

(b) The bonds shall be eligible to secure deposits of all public funds and shall be legal for investment of municipal, county, bank, fiduciary, insurance company, and trust funds.

History. Acts 2011, No. 1125, § 1.

11-10-1016. Bonds — Rights and liabilities — Enforcement.

(a)(1) This subchapter shall constitute a contract between the State of Arkansas and the registered owners of all State of Arkansas Unemployment Trust Fund Bonds issued under this subchapter that shall never be impaired.

(2) A violation of terms of this subchapter, whether under purported legislative authority or otherwise, shall be enjoined by the courts at the suit of any bondholder or of any taxpayer.

(b) The courts in a suit against the Arkansas Development Finance Authority, or other appropriate officer or official of this state shall prevent a diversion of any revenues pledged under this subchapter and shall compel the restoration of diverted revenues by injunction or mandamus.

(c) Without limitation as to any other appropriate remedy at law or in equity, any bondholder by an appropriate action, including without limitation, injunction or mandamus, may compel the performance of all covenants and obligations of the State of Arkansas and its officers and officials under this subchapter.

History. Acts 2011, No. 1125, § 1.

11-10-1017. Unemployment obligation assessment.

(a)(1)(A) Except employers that have made an election to reimburse the Unemployment Compensation Fund under § 11-10-713(c), each employer shall pay a separate and additional assessment, to be known as the “unemployment obligation assessment”, on wages paid by that employer with respect to employment in addition to the contributions, stabilization and extended benefits taxes, and advance interest taxes levied under §§ 11-10-703 — 11-10-708.

(B) The unemployment obligation assessment shall be based on the aggregate principal amount of bonds issued for nonrefunding purposes and shall be determined by multiplying the employer's contribution rate as described in §§ 11-10-704 and 11-10-705 and in effect on the date that the Governor issues a proclamation calling an election on the issuance of the bonds for employers with accounts as of such date and in effect as of the employer's liability date for employers establishing accounts after the date of the proclamation, by:

(i) Twenty-five percent (25%) if the aggregate principal amount of bonds issued is three hundred fifty million dollars (\$350,000,000) or less;

(ii) Thirty percent (30%) if the aggregate principal amount of bonds issued is three hundred fifty million and one dollars (\$350,000,001) to four hundred million dollars (\$400,000,000);

(iii) Thirty-three and five-tenths percent (33.5%) if the aggregate principal amount of bonds issued is four hundred million and one dollars (\$400,000,001) to four hundred fifty million dollars (\$450,000,000); and

(iv) Thirty-seven and five-tenths percent (37.5%) if the aggregate principal amount of bonds issued is four hundred fifty million and one dollars (\$450,000,001) to five hundred million dollars (\$500,000,000).

(C)(i) The effective date of the unemployment obligation assessment shall be the first day of the calendar quarter immediately following the month in which the Secretary of State certifies the vote of the voters approving the unemployment obligation assessment and the issuance of the bonds under this subchapter.

(ii) The unemployment obligation assessment is effective until the end of the quarter immediately following the repayment of all bonds authorized under this subchapter.

(2)(A) This unemployment obligation assessment shall not be credited to the separate account of any employer.

(B) The unemployment obligation assessment shall be levied and collected in the same manner as contributions and shall be subject to the same penalty and interest, collection, impoundment, priority, lien, certificate of assessment, and assessment provisions and procedures under §§ 11-10-716 — 11-10-722.

(b)(1) Receipts from the unemployment obligation assessment and any penalty and interest on the unemployment obligation assessment shall be deposited into the Unemployment Compensation Fund Clearing Account.

(2) At least once each month, deposits of the unemployment obligation assessment payment and any interest and penalty payments applicable to the unemployment obligation assessment shall be deposited into the Department of Workforce Services Bond Financing Trust Fund.

(c) Debt service on the bonds shall be paid in a timely manner and shall not be paid directly or indirectly by an equivalent reduction in unemployment contributions or taxes imposed under:

(1) Sections 11-10-701 — 11-10-715; or

(2) Section 11-10-801 et seq.

(d) The unemployment obligation assessment may be used to:

(1) Repay the principal of and interest on advances from the federal trust fund under Title XII of the Social Security Act, 42 U.S.C. § 1321;

(2) Pay the costs of issuance of the bonds, including without limitation the costs of bond insurance or other credit enhancement;

(3) Pay unemployment benefits by depositing bond proceeds into the Unemployment Compensation Fund;

(4) Provide a debt service reserve; and

(5) Pay capitalized interest on the bonds for a period not to exceed two (2) years.

(e) The Director of the Department of Workforce Services shall promulgate rules to carry out the provisions of this section.

(f) Upon retirement of all bonds, the following shall be transferred to the Unemployment Compensation Fund:

(1) Surplus unemployment obligation assessment collections; and

(2) Delinquent taxes, penalties, or interest due under the unemployment obligation assessment.

History. Acts 2011, No. 1125, § 1.

11-10-1018. Department of Workforce Services — Bond Financing Trust Fund.

(a)(1) There is established on the books of the Department of Workforce Services a special restricted fund to be known as the “Bond Financing Trust Fund”, to be maintained and administered by the department under this subchapter for the purposes stated in this subchapter.

(2) The following shall be deposited into the Bond Financing Trust Fund:

(A) Collections of the unemployment obligation assessment; and

(B) Any penalties and interest with respect to the unemployment obligation assessment.

(b) Moneys in the Bond Financing Trust Fund may be used to:

(1) Pay debt service on the bonds;

(2) Make refunds of the unemployment obligation assessment and interest and penalty payments that were erroneously paid;

(3) Return moneys to the Unemployment Compensation Fund Clearing Account that may have been incorrectly identified and erroneously transferred to the Bond Financing Trust Fund; and

(4) Purchase or redeem outstanding bonds.

(c) The department shall maintain the Bond Financing Trust Fund at the Arkansas Development Finance Authority or at one (1) or more financial institutions within or outside the state.

(d) Income from investment of moneys in the Bond Financing Trust Fund shall be deposited into and credited to the Bond Financing Trust Fund.

(e)(1) All moneys received for, deposited into, or paid to the department for deposit into the Bond Financing Trust Fund:

(A) Are specifically declared to be cash funds restricted in their use;

(B) Shall not be deposited into the State Treasury for the purposes of:

(i) Arkansas Constitution, Article 5, § 29;

(ii) Arkansas Constitution, Article 16, § 12;

(iii) Arkansas Constitution, Amendment 20; or

(iv) Any other constitutional provision or statutory law; and

(C) Shall be held and applied by the department and the Arkansas Development Finance Authority as agent for the department solely for the uses set forth in this subchapter.

(2) Interest and other moneys received from the investment of moneys in the Bond Financing Trust Fund are cash funds restricted in their use and shall not be deposited into the State Treasury but shall be held and applied by the department and the Arkansas Development Finance Authority as agent for the department solely for the uses set forth in this subchapter.

(f) Upon retirement of all bonds, the following shall be transferred to the Unemployment Compensation Fund:

- (1) Surplus unemployment obligation assessment collections; and
- (2) Delinquent taxes, penalties, or interest due under the unemployment obligation assessment.

History. Acts 2011, No. 1125, § 1.

CHAPTER 11

EMPLOYMENT OFFICES AND AGENCIES

SUBCHAPTER.

1. GENERAL PROVISIONS.
 2. PRIVATE EMPLOYMENT AGENCIES.
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RESEARCH REFERENCES

ALR. Liability of employment agency for personal injury or property damage suffered by employer from acts of referred employee, or by employee from acts of referred employer. 41 A.L.R.4th 531.

Am. Jur. 27 Am. Jur. 2d, Employ. Ag., § 1 et seq.
C.J.S. 51 C.J.S., Labor, § 19.

SUBCHAPTER 1 — GENERAL PROVISIONS

SECTION.

11-11-101. Recruitment of labor by foreign labor agents.

Cross References. Establishment of state employment service, § 11-10-304.

11-11-101. Recruitment of labor by foreign labor agents.

(a) No foreign labor agent, labor bureau or employment agency, or any other person shall enter this state and attempt to hire, induce, or take from this state any labor, singularly or in groups, for any purpose, whether or not a fee or charge is extracted from the worker, without first applying to the Director of the Department of Labor for a license to do so and filing with the director:

(1) A statement as to where the labor is to be taken, for what purpose, for what length of time, and whether transportation is to be paid to and from the destination, if temporary;

(2) A statement of the financial standing of the employer desiring the labor;

(3) An affidavit of authority to represent the employer in this state; and

(4) Whatever other information the director may require.

(b)(1) The director shall determine whether the person desiring the labor from this state is a labor agent, labor bureau, or employment agency and, if so, whether the applicant is qualified to be licensed under the laws of this state and according to the provisions of this section.

(2) The director, after the investigation, may refuse to license or register the applicant until the applicant has complied with the provisions of this section.

(3) The applicant shall, in the event of unfavorable action by the director, have the right of appeal to the proper court.

(c) This section is cumulative to all existing laws affecting the hiring or employment of labor.

History. Acts 1949, No. 272, §§ 1, 2; A.S.A. 1947, §§ 81-1011, 81-1012.

SUBCHAPTER 2 — PRIVATE EMPLOYMENT AGENCIES

SECTION.

- 11-11-201. Title.
- 11-11-202. Definitions.
- 11-11-203. Penalty.
- 11-11-204. Director and department — Powers and duties.
- 11-11-205 — 11-11-207. [Repealed.]
- 11-11-208. License required — Penalties.
- 11-11-209. Certificate of exemption required for certain organizations.
- 11-11-210. Employment counselor's license — Application — Qualifications.
- 11-11-211. Agency manager license — Application — Qualifications.
- 11-11-212. Employment agency license — Application — Qualifications.
- 11-11-213. Employment agency license — Bond required — Action on the bond.
- 11-11-214. Investigation of license applicant by director.
- 11-11-215. Employment agency license — Scope — Change of license.

SECTION.

- 11-11-216. Examination for licenses.
- 11-11-217. License fees.
- 11-11-218. Temporary licenses.
- 11-11-219. Renewal of licenses.
- 11-11-220. Cessation of business by licensee.
- 11-11-221. Issuance, refusal, suspension, or revocation of license — Grounds.
- 11-11-222. Refusal, suspension, or revocation of license — Notice and hearing.
- 11-11-223. Judicial review of director's administrative orders.
- 11-11-224. Deceptive practices.
- 11-11-225. Miscellaneous restrictions and requirements.
- 11-11-226. Designation of manager required.
- 11-11-227. Fee restrictions and requirements.
- 11-11-228. Filing of fee schedule, forms, and contracts required.
- 11-11-229. Records required.

Effective Dates. Acts 1977, No. 390, § 4: Mar. 10, 1977. Emergency clause provided: "It is hereby found and determined by the General Assembly that confusion exists in the enforcement of the law because Act 493 of 1975 does not specifically exempt preparers of resumes. Therefore, an emergency is hereby declared to exist, and this Act, being necessary for the im-

mediate preservation of the public peace, health and safety, shall take effect and be in force from the date of its passage and approval."

Acts 1997, No. 250, § 258: Feb. 24, 1997. Emergency clause provided: "It is hereby found and determined by the General Assembly that Act 1211 of 1995 established the procedure for all state boards

and commissions to follow regarding reimbursement of expenses and stipends for board members; that this act amends various sections of the Arkansas Code which are in conflict with the Act 1211 of 1995; and that until this cleanup act becomes effective conflicting laws will exist. Therefore an emergency is declared to exist and this act being immediately necessary for the preservation of the public

peace, health and safety shall become effective on the date of its approval by the Governor. If the bill is neither approved nor vetoed by the Governor, it shall become effective on the expiration of the period of time during which the Governor may veto the bill. If the bill is vetoed by the Governor and the veto is overridden, it shall become effective on the date the last house overrides the veto."

11-11-201. Title.

This subchapter may be cited as the "Arkansas Private Employment Agency Act of 1975".

History. Acts 1975, No. 493, § 1; A.S.A. 1947, § 81-1013.

11-11-202. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Agency manager" means the individual designated by the employment agency to conduct the general management, administration, and operation of a designated employment agency office. Every employment agency must maintain a licensed agency manager at each of its separate office locations;

(2) "Applicant" except when used to describe an applicant for an employment agency or agency manager's or counselor's license means any person, whether employed or unemployed, seeking or entering into an arrangement for employment or change of employment through the medium or service of an employment agency;

(3) "Department" means the Department of Labor;

(4) "Director" means the Director of the Department of Labor;

(5) "Employee" means a person performing or seeking to perform work or service of any kind or character for compensation;

(6) "Employer" means a person employing or seeking to employ a person for compensation;

(7)(A) "Employment agent" or "employment agency" means any person engaged for hire, compensation, gain, or profit in the business of furnishing persons seeking employment with information or other service enabling the persons to procure employment by or through employers or furnishing any other person who may be seeking to employ or may be in the market for help of any kind with information enabling the other person to procure help.

(B) However, "employment agent" or "employment agency" does not mean:

(i) Any person who prepares resumes for individuals for employment purposes if the person who prepares the resumes does not refer or purport to refer prospective employees to employers or employers

to prospective employees, does not represent himself or herself as an employment agency, or does not have any financial connection with any employment agency;

(ii) Any person who employs individuals to render part-time or temporary services to, for, or under the direction of a third person if the person employing the individuals, in addition to paying wages or salaries, pays federal social security taxes and state and federal unemployment insurance and secures work-service to, for, or under the direction of a third person;

(iii) Any bona fide nursing school, nurses' registry, management consulting firm, business school, or vocational school whose primary function and purpose is training and education, except that if such an organization charges a fee, directly or indirectly, for job placement of individuals, the organization shall be an employment agency within the meaning of this subchapter;

(iv) A labor organization;

(v) Any person who publishes advertisements placed and paid for by a third person seeking employment or an employee, provided that the person does not procure or offer to procure employment or employees; or

(vi) Any person who contracts with an employer to recruit employees for the employer without charge to the prospective employee;

(8) "Employment counselor" means an employee of any employment agency who interviews, counsels, or advises applicants or employers, or both, on employment or allied problems or who makes or arranges contracts or contacts between employers and employees. The term "employment counselor" includes employees who solicit orders for employees from prospective employers;

(9) "Fee" shall mean anything of value, including any money or other valuable consideration exacted, charged, collected, or received, directly or indirectly, or paid or contracted to be paid for any services or act by an employment agency; and

(10) "Person" means any individual, company, firm, association, partnership, or corporation.

History. Acts 1975, No. 493, § 2; 1977, No. 390, § 1; A.S.A. 1947, § 81-1014; Acts 1989, No. 750, § 1; 1997, No. 435, § 1.

CASE NOTES

Employment Agency.

A construction contract by which a builder undertook to furnish labor and materials was not the type of agreement which falls within the province of an em-

ployment agency, and a person who procured the contract for another was not thereby operating an employment agency, under law. *Brown v. Lee*, 242 Ark. 122, 412 S.W.2d 273 (1967).

11-11-203. Penalty.

(a) The Director of the Department of Labor shall have authority to impose a fine of not less than twenty-five dollars (\$25.00) nor more than five hundred dollars (\$500) for violation of the provisions of this subchapter by an employment agency or its employees or agents.

(b) The director shall notify the employment agency in writing of the reasons for imposition of a fine and at that time shall make available to the employment agency a signed written statement by any individual having filed a complaint with the director relative to the matter for which a fine has been imposed by the director.

(c) The agency shall have the right to a hearing before the director and the right to judicial review provided by § 11-11-223 with respect to the fine.

History. Acts 1975, No. 493, § 9; A.S.A. 1947, § 81-1021.

11-11-204. Director and department — Powers and duties.

(a) It shall be the duty of the Department of Labor, and it shall have the power, jurisdiction, and authority to administer and enforce the provisions of this subchapter.

(b) The Director of the Department of Labor shall have the power, jurisdiction, and authority to issue licenses to employment agencies, agency managers, and counselors and to refuse to issue, revoke, or suspend the licenses when, after due investigation, and in compliance with the procedures set forth in §§ 11-11-221 and 11-11-222, the director finds that the applicant is for good and sufficient cause unfit to be an employment agent, agency manager, or counselor within the meaning of this subchapter or any rules, regulations, or orders lawfully promulgated under this subchapter.

(c)(1) Complaints against any person, employment agent, agency manager, or counselor may be made to the department orally or in writing.

(2) The director shall have the power to compel attendance of witnesses by issuance of subpoenas, administer oaths, direct production of documents and records, and direct taking of testimony and evidence concerning all matters within the jurisdiction of the department.

(3) The director may order testimony to be taken by deposition in any proceeding pending before the department at any stage of the proceeding.

(4) The director or his or her duly authorized agent shall at all reasonable times have access to, for the purpose of examination and copying, the books, records, papers, and documents of any person being investigated or proceeded against under the provisions of this subchapter, so long as the books, records, papers, or documents sought to be inspected or copied are reasonably related to the investigation or proceeding being conducted by the director.

(5) The director or his or her authorized agent shall, upon application of any party to proceedings before the director, issue to the party subpoenas requiring the attendance and testimony of witnesses or the production of any books, records, papers, or documents reasonably related to issues involved in proceedings before the director or an investigation conducted by the director.

(6) If any person in proceedings before the director or in investigations conducted by the director disobeys or resists any lawful order or process issued by the director or his or her authorized agents, or fails to produce, after being lawfully directed to do so, any book, paper, record, or document, or refuses to appear and testify after being subpoenaed to do so, the director shall certify the facts to any court of competent jurisdiction in the state or to the Pulaski County Circuit Court.

(7) The court shall have authority to conduct hearings and punish any person for failure or refusal to testify or produce books, papers, documents, or records subpoenaed or ordered by the director as though the conduct constituted contempt of court.

(8) Witnesses summoned by the director or his or her authorized agent shall be paid the same fees and mileage paid to witnesses in the courts of this state.

(d)(1) The director may prescribe such rules and regulations for the conduct of the business of private employment agencies as necessary to implement this subchapter.

(2) These rules shall have the force and effect of law and shall be enforced by the director in the same manner as the provisions of this subchapter.

(3) Adoption of rules and regulations pursuant to this subsection shall be carried out in compliance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(e) The department shall have authority to investigate employment agents, agency managers, and counselors. The department shall have the right to examine records required by law to be kept and maintained by employment agents, agency managers, and counselors and to examine the offices where the business is or shall be conducted by them.

(f) The department may seek to recover in a court of competent jurisdiction fees charged or collected in violation of this subchapter.

History. Acts 1975, No. 493, § 9; A.S.A. 1947, § 81-1021; Acts 2007, No. 827, § 126; 2009, No. 405, § 1.

CASE NOTES

Rules and Regulations.

The commissioner had no express or implied authority to impose additional conditions upon the granting of licenses to private employment agencies by the adoption of rules and regulations, under prior licensing law. *Arkansas Dep't of Labor v.*

American Emp. Agency, 257 Ark. 509, 517 S.W.2d 949 (1975) (decision under prior law).

Rules and regulations of the commissioner that pertained to the use of fictitious names and that required agencies to disclose the name of the employer to the

applicant prior to the signing of the contract were not necessary to expedite the enforcement of the prohibitions of prior licensing law. *Arkansas Dep't of Labor v.*

American Emp. Agency, 257 Ark. 509, 517 S.W.2d 949 (1975) (decision under prior law).

11-11-205 — 11-11-207. [Repealed.]

Publisher's Notes. These sections, concerning creation, members, officers, and powers and duties of the Arkansas Employment Agency Advisory Council, were repealed by Acts 2007, No. 827, § 127. These sections were derived from the following sources:

11-11-205. Acts 1975, No. 493, § 3; A.S.A. 1947, § 81-1015; Acts 1997, No. 250, § 62.

11-11-206. Acts 1975, No. 493, § 3; A.S.A. 1947, § 81-1015.

11-11-207. Acts 1975, No. 493, § 3; A.S.A. 1947, § 81-1015.

11-11-208. License required — Penalties.

(a) No person shall engage in the business of or act as an employment agent, agency manager, or counselor unless he or she first obtains a license from the Department of Labor.

(b)(1)(A) Any person who shall engage in the business of or act as an employment agent, agency manager, or counselor without first procuring a license is guilty of a misdemeanor.

(B) He or she shall be punished by a fine of not less than fifty dollars (\$50.00) and not more than two hundred fifty dollars (\$250) for each day of acting as an employment agent, agency manager, or counselor without a license or by imprisonment for not more than three (3) months, or by both.

(2) In addition to the penalties described in subdivision (b)(1) of this section, upon petition of the director, any court in the state having the statutory power to enjoin or restrain shall have jurisdiction to restrain and enjoin any person who engages in the business of or acts as an employment agent, agency manager, or counselor without having first procured a license for so engaging or acting.

History. Acts 1975, No. 493, § 4; 1977, No. 390, § 2; A.S.A. 1947, § 81-1016.

11-11-209. Certificate of exemption required for certain organizations.

(a) Bona fide nursing schools, nurses' registries, management consulting firms, business schools, vocational schools whose primary function and purpose is training and education, and resume services shall obtain from the Director of the Department of Labor a certificate of exemption from the requirements of this subchapter.

(b) In connection with issuance of a certificate of exemption and with respect to an organization's continued eligibility for a previously issued certificate of exemption, the director shall have those investigative powers conferred by § 11-11-204.

History. Acts 1975, No. 493, § 2; 1977, No. 390, § 1; A.S.A. 1947, § 81-1014.

11-11-210. Employment counselor's license — Application — Qualifications.

(a) To be eligible for application for an employment counselor's license, the applicant shall be:

- (1) A citizen of the United States;
- (2) Of good moral character;
- (3) A person whose license has not been revoked within two (2) years from the date of application; and
- (4) Able to demonstrate business integrity.

(b)(1) Every applicant for an initial license for employment counselor shall file with the Department of Labor a written application on a form prescribed and furnished by the Director of the Department of Labor.

(2) The applicant shall file at least two (2) letters of character reference from persons of reputed business or professional integrity.

(3) This application shall contain information prescribed by the director.

History. Acts 1975, No. 493, § 5; A.S.A. 1947, § 81-1017.

11-11-211. Agency manager license — Application — Qualifications.

(a) To be eligible to apply for a license to act as an agency manager, the applicant shall be:

- (1) A citizen of the United States;
- (2) Of good moral character;
- (3) At least twenty-one (21) years of age;
- (4) A person whose license has not been revoked within two (2) years from the date of the application;

(5) A person who has completed the twelfth grade, except that the Director of the Department of Labor may establish proof necessary to him or her that the applicant is possessed of a twelfth-grade education in terms of intellectual competency, judgment, and achievement; and

(6) A person who demonstrates business integrity, financial responsibility, and judgment.

(b)(1) Every applicant for an initial license for agency manager shall file with the Department of Labor a written application on a form prescribed and furnished by the director.

(2) The applicant shall file at least two (2) letters of character reference from persons of reputed business or professional integrity.

(3) This application shall contain information prescribed by the director.

History. Acts 1975, No. 493, § 5; A.S.A. 1947, § 81-1017.

11-11-212. Employment agency license — Application — Qualifications.

(a) To be eligible to apply for a license to operate an employment agency, the applicant shall be:

- (1) A citizen of the United States;
- (2) Of good moral character;
- (3) At least twenty-one (21) years of age;
- (4) A person whose license has not been revoked within two (2) years from the date of the application;
- (5) A person who has completed the twelfth grade, except that the Director of the Department of Labor may establish proof necessary to him or her that the applicant is possessed of a twelfth-grade education in terms of intellectual competency, judgment, and achievement; and
- (6) A person who demonstrates business integrity, financial responsibility, and judgment.

(b)(1) Every applicant for an initial employment agency license and every applicant for a renewal license shall file with the director a completed application on a form prescribed and furnished by the director.

(2)(A) The application shall be signed by the applicant and sworn to before anyone qualified by law to administer oaths.

(B) If the applicant is a corporation, the application shall state the names and home addresses of all shareholders, officers, and directors of the corporation and shall be signed and sworn to by the president, treasurer, and secretary thereof.

(C) If the applicant is a partnership, the application shall state the names and home addresses of all partners therein and shall be signed and sworn to by all of them.

(3) The applicant shall file at least two (2) letters of character reference from persons of reputed business or professional integrity.

(4) This application shall also contain such other information as the director may prescribe.

History. Acts 1975, No. 493, § 5; A.S.A. 1947, § 81-1017.

11-11-213. Employment agency license — Bond required — Action on the bond.

(a)(1) Every application for issuance or renewal of an employment agency's license shall be accompanied by a bond in the sum of five thousand dollars (\$5,000) with a duly licensed surety company or companies authorized to do business in this state.

(2) The terms and conditions of the bond shall be approved by the Director of the Department of Labor.

(3) The bond shall be conditioned that the employment agency and each member, employee, shareholder, director, or officer of a person, firm, partnership, corporation, or association operating as the employment agency will not violate the provisions of this subchapter or violate

rules, regulations, or orders lawfully promulgated by the director or violate the terms of any contract made by the employment agent in the conduct of its business.

(b)(1) If any person shall be aggrieved by the misconduct of any licensee, that person may maintain an action in his or her own name upon the bond of the employment agency in any court of competent jurisdiction or in the Pulaski County Circuit Court.

(2)(A) All claims shall be assignable, and the assignee shall be entitled to the same remedies upon the bond of the licensee as the person aggrieved would have been entitled to if the claim had not been assigned.

(B) Any claim so assigned may be enforced in the name of the assignee.

(3) Any remedies given by this section shall not be exclusive of any other remedy that would otherwise exist.

(c) Action on the bond required by this section may be maintained by the director in the name of the state in any court of competent jurisdiction or in the Pulaski County Circuit Court, for the benefit of any person or persons aggrieved by the misconduct of the licensee.

(d)(1) If any licensee fails to file a new bond with the Department of Labor within thirty (30) days after notice of cancellation by the surety of the bond required by this section, the license issued to the principal under the bond is suspended until such time as a new surety bond is filed with and approved by the director.

(2) A person whose license is suspended pursuant to this subsection shall not carry on the business of an employment agency during the period of the suspension.

History. Acts 1975, No. 493, § 6; A.S.A. 1947, § 81-1018.

11-11-214. Investigation of license applicant by director.

(a) Upon filing of an application for a license as provided in this subchapter, the Director of the Department of Labor shall cause an investigation to be made regarding the character, business integrity, and financial responsibility of the license applicant.

(b) The director shall also determine the suitability or unsuitability of the applicant's proposed office location.

(c) An application for an employment agency's, agency manager's, or employment counselor's license shall be rejected by the director if it is found that any person named in the license application is not of good moral character, business integrity, or financial responsibility or if there is good and sufficient reason within the meaning and purpose of this subchapter for rejecting the application.

History. Acts 1975, No. 493, § 5; A.S.A. 1947, § 81-1017.

11-11-215. Employment agency license — Scope — Change of license.

(a)(1) An employment agent's license issued pursuant to this subchapter shall protect only those persons to whom it is issued and only the location for which it is issued.

(2) A separate license shall be required for each separate office location operated by an employment agency.

(3) No license shall be valid to protect any business transacted under any name other than that designated in the license.

(b) No employment agent shall permit any person not mentioned in the license or license application to become a member, officer, director, shareholder, or partner in the conduct of the business of the employment agent unless written consent of the Director of the Department of Labor and written consent of the surety on the bond required by this subchapter shall first be obtained.

(c) The location of an employment agency shall not be changed without written consent from the director, and a new license application shall be required for any change of office location in excess of twenty-five (25) miles.

(d) A charge of ten dollars (\$10.00) shall be made by the Department of Labor for the recording of authorization for each change of office location authorized by this section.

History. Acts 1975, No. 493, § 7; A.S.A. 1947, § 81-1019.

11-11-216. Examination for licenses.

(a)(1)(A) Before the Director of the Department of Labor issues a license to an applicant for a permanent employment agent's, permanent agency manager's, or permanent counselor's license, the applicant shall be required to successfully complete a written examination prepared by the director.

(B) The examination shall establish the competency of the applicant to:

(i) Operate and conduct an employment agency; or

(ii) Perform service as an agency manager or counselor for the agency.

(2) No examination shall be required for renewal of any license issued pursuant to this subchapter unless the license has been suspended, revoked, or submitted late, causing the application to be treated as a new application.

(b) The Department of Labor shall hold examinations at such times and places as it shall reasonably determine, except that examinations shall be given to license applicants at least once every sixty (60) days.

(c)(1) An examination fee of five dollars (\$5.00) shall be paid by each applicant in addition to the license fee.

(2) The examination fee shall be retained by the department, whether or not the applicant successfully completes the examination.

(3) The examination fee shall be forfeited if the applicant does not take the examination within three (3) months of the application date.

History. Acts 1975, No. 493, § 10; A.S.A. 1947, § 81-1022; Acts 2007, No. 827, § 128.

11-11-217. License fees.

(a) Before a permanent license shall be granted to a license applicant, an applicant shall pay the following annual fee for each license:

- (1) Two hundred fifty dollars (\$250) for an employment agency;
- (2) Twenty-five dollars (\$25.00) for an employment agency manager; and

(3) Twenty dollars (\$20.00) for an employment counselor.

(b) Multiple licenses for a person simultaneously performing the functions of employment agent, agency manager, or employment counselor will not be required. The person shall procure a license commensurate with the highest level of job duties and responsibilities customarily and regularly performed by the person.

(c) All moneys received from licensing shall be deposited into the general fund of the State Treasury.

History. Acts 1975, No. 493, § 5; A.S.A. 1947, § 81-1017.

11-11-218. Temporary licenses.

(a)(1) The Director of the Department of Labor shall have authority to issue a temporary license for operation of a private employment agency, which shall be valid for no more than ninety (90) days, upon submission by the applicant for the license of:

(A) A properly completed application form furnished and approved by the director;

(B) Submission of evidence of the applicant's compliance with the bonding requirements of this subchapter; and

(C) Payment of a temporary license fee of one hundred dollars (\$100).

(2) The temporary license may be issued only if, after investigation, it reasonably appears that the applicant will meet the qualifications for a permanent private employment agency license.

(b)(1) The director shall have authority to issue temporary licenses for agency managers and employment counselors, which shall be valid for no more than ninety (90) days, upon submission by the applicant for such license of:

(A) A properly completed application form, furnished and approved by the director; and

(B) Payment of a temporary license fee of ten dollars (\$10.00).

(2) The temporary licenses for agency managers and employment counselors may be issued only if, after investigation, it reasonably

appears that the applicant will meet the qualifications for a permanent license as agency manager or employment counselor.

(3) Temporary licenses issued to agency managers and employment counselors are nontransferable and are automatically rescinded upon suspension or termination of the employment of the agency manager or employment counselor.

(4) The director shall approve or reject an application for a temporary agency manager's license or temporary employment counselor's license within five (5) days after receipt of a properly completed application for the license.

History. Acts 1975, No. 493, § 5; A.S.A. 1947, § 81-1017.

11-11-219. Renewal of licenses.

(a) Every license issued pursuant to this subchapter shall remain in force for one (1) year from the date of issue or until the end of the state's fiscal year, whichever occurs first, unless the license has been revoked pursuant to the provisions of this subchapter.

(b) Applications for renewal of all licenses provided by this subchapter must be filed with the Director of the Department of Labor no later than thirty (30) days prior to expiration of the license.

(c) Any licensee who fails to renew a license by the expiration date shall be automatically suspended from the right to engage in the activity authorized by the license until the license is renewed.

(d) Every application for renewal of a license must be accompanied by payment of the required license fee and evidence of compliance with the bonding requirements of this subchapter.

History. Acts 1975, No. 493, § 8; A.S.A. 1947, § 81-1020.

11-11-220. Cessation of business by licensee.

(a)(1) If an employment agent ceases business operations, the agent shall, as soon as reasonably possible, notify the Department of Labor and shall deliver or forward by mail the agent's license to the department. Failure to give notice, or failure to deliver such employment agent's license, shall be a violation of § 11-11-208.

(2)(A) When one (1) or more individuals, on the basis of whose qualifications an agency license has been obtained, ceases to be connected with the licensed business for any reason whatsoever, the agency business may be carried on for a temporary period not to exceed thirty (30) days, under such terms and conditions as the Director of the Department of Labor shall provide by regulation for the orderly closing of the business or the replacement and qualification of a new member, partner, or corporate officer, director, or shareholder.

(B) The agency's authorization to continue to do business under this subchapter beyond the thirty-day period provided in this subdivision (a)(2) shall be contingent upon approval by the director of any new member, principal, partner, officer, director, or shareholder.

(b)(1) If an agency manager terminates his or her employment with an employment agency by which he or she is employed, the agency shall notify the department, as soon as is reasonably possible, to enable the department to know at all times the identity of the person charged with the general management of each of the agency's office locations.

(2) The employment agency shall also deliver or forward by mail the agency manager's license, together with the reasons why the agency manager has terminated his or her position with the employment agency.

(c) If an employment counselor terminates his or her employment with the employment agency by which he or she is employed, the agency shall, as soon as is reasonably possible, notify the department and deliver or forward by mail the employment counselor's license to the department, together with the reasons for his or her termination.

History. Acts 1975, No. 493, §§ 5, 8;
A.S.A. 1947, §§ 81-1017, 81-1020.

11-11-221. Issuance, refusal, suspension, or revocation of license — Grounds.

(a) The Director of the Department of Labor shall issue a license as an employment agent, agency manager, or counselor to any person who qualifies for the license under the terms of this subchapter.

(b) The director may, in addition, refuse to issue a license to any person or may suspend or revoke the license of any employment agent, agency manager, or employment counselor or impose administrative fines as provided for in § 11-11-203 when the director finds that any of the following conditions exist:

(1) That the employment agent, agency manager, or counselor has violated any of the provisions of this subchapter;

(2) That the employment agent, agency manager, or counselor has violated any of the rules and regulations or other orders lawfully promulgated by the director;

(3) That the employment agent, agency manager, or counselor has violated the conditions of the bond required by § 11-11-213;

(4) That the person, employment agent, agency manager, or employment counselor has engaged in a fraudulent, deceptive, or dishonest practice;

(5) That the person, employment agent, agency manager, or employment counselor has been legally adjudicated incompetent; or

(6) That the applicant is for good and sufficient cause unfit to be an employment agent, agency manager, or employment counselor within the meaning of this subchapter or of any of the rules and regulations or orders lawfully promulgated by the director.

(c) This section and § 11-11-222 shall not be construed to relieve any person from civil liability or from criminal prosecution under the provisions of this subchapter or under other laws of this state.

History. Acts 1975, No. 493, § 13;
A.S.A. 1947, § 81-1025.

CASE NOTES

Refusal to Issue.

The director had no discretionary power to deny an application of a private employment agency for a license under prior

licensing statute. *Cline v. Plaza Personnel Agency, Inc.*, 252 Ark. 956, 481 S.W.2d 749 (1972) (decision under prior law).

11-11-222. Refusal, suspension, or revocation of license — Notice and hearing.

(a)(1) The Director of the Department of Labor may not refuse to issue a license or suspend or revoke a license unless it furnishes the person, employment agent, agency manager, or employment counselor with a written statement of the charges against him or her and affords him or her an opportunity to be heard on the charges.

(2) At the time that written charges are furnished to an employment agency, the director shall make available to the agency a signed written statement by any individual having filed a complaint with the director relative to the matter for which charges have been filed by the director.

(3) The agency shall be given at least twenty (20) days' written notice of the date and time of the hearing. The notice shall conform to the standards for notices set forth in the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(4) The notice shall be sent by certified mail, return receipt requested, to the address of the person as shown on his or her application for license, or it may be served in the manner in which a summons is served in civil cases commenced in the circuit courts of this state.

(b)(1) At the time and place fixed for the hearing, the director shall hold the hearing and thereafter make his or her order either dismissing the charges or refusing, suspending, or revoking the license.

(2)(A) At the hearing, the accused shall have the right to appear personally and by counsel and to cross-examine witnesses against him or her.

(B)(i) He or she shall be allowed to produce evidence and witnesses in his or her defense and shall have the right to have witnesses subpoenaed.

(ii) The subpoenas shall be issued by the director.

(c)(1) A stenographic record of all proceedings shall be made, and a transcript of the proceedings shall be made if desired by the Department of Labor or by the accused.

(2) The transcript shall be paid for by the party ordering it.

History. Acts 1975, No. 493, § 13;
A.S.A. 1947, § 81-1025.

11-11-223. Judicial review of director's administrative orders.

(a) If the Director of the Department of Labor refuses to grant a license, suspends or revokes a license that has been granted, or imposes an administrative fine as provided in §§ 11-11-213, 11-11-221, and 11-11-222, the person adversely affected or aggrieved by the order of the director issued pursuant to the provisions of §§ 11-11-221 and 11-11-222 may obtain a review of the order.

(b) The order may be brought in the circuit court in the judicial district in which the violation is alleged to have occurred, where the employment agent, manager, or counselor worked, or in the Pulaski County Circuit Court or, if the aggrieved person is a nonresident of the state, in the Pulaski County Circuit Court.

(c)(1) The review may be obtained by filing in the court within thirty (30) days following the issuance of the order a written petition praying that the order be modified or set aside.

(2)(A) A copy of the petition shall be forthwith transmitted by the clerk of the court to the Department of Labor.

(B) Thereupon, the department shall file in the court the record of proceedings before the department.

(d) Upon the filing, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter upon the pleadings, testimony, and proceedings set forth in the record a decree affirming, modifying, or setting aside, in whole or in part, the order of the director and enforcing the same to the extent that the order is affirmed.

(e) Commencement of proceedings under this section shall not, unless ordered by the court, operate as a stay of the order of the director.

(f)(1) No objection which has not been urged before the director shall be considered by the court.

(2) The findings of the director with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

(g)(1) If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the director, the court may order the additional evidence to be taken before the director and made a part of the record.

(2)(A) The director may modify his or her findings as to the facts or make new findings, by reason of additional evidence so taken and filed, and the director shall file the modified or new findings with the court.

(B) The findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

(h) Upon the filing of the record with it, the jurisdiction of the court shall be exclusive, and its judgment and decree shall be final, except that it shall be subject to review by the Supreme Court.

(i)(1) The department shall certify the record of its proceedings if the party commencing the proceedings shall pay to it the cost of preparing and certifying the records, including the recording and transcribing of all testimony introduced in the proceedings.

(2) If payment of the costs of preparing and certifying the records, including the recording and transcribing of all testimony introduced in the proceedings, is not made by the party commencing the proceedings for review within ten (10) days after notice from the department of the cost of preparing and certifying the record, the circuit court in which the proceeding is pending, on motion of the director, shall dismiss the petition.

History. Acts 1975, No. 493, § 14;
A.S.A. 1947, § 81-1026.

11-11-224. Deceptive practices.

(a) No employment agent shall publish or cause to be published any fraudulent or misleading notice or advertisement of the employment agency by means of cards, circulars, or signs or in newspapers or other publications.

(b) All letterheads, receipts, and blanks shall contain the full name and address of the employment agency, and the licensee shall state in all notices and advertisements the fact that the licensee is or conducts a private employment agency.

(c) No employment agency shall print, publish, or paint on any sign or window or insert in any newspaper or publication a name similar to that of the Arkansas State Employment Service or any other governmental agency.

(d) No employment agency shall print or stamp on any receipt or on any contract used by the agency any part of this subchapter unless the entire section from which the part is taken is printed or stamped thereon.

(e) No employment agency shall allow any person in its employment to use any names other than their legal names in the course of and in respect to their employment with the agency.

(f) No employment agency or its employees or agents shall give any information or make any representation to any applicant, where the agency or its employees or agents know or reasonably should know that the information or representation is false.

(g) No employment agency or its employees or agents shall knowingly withhold from a job applicant any information material to a job to which that applicant is referred.

(h) No employment agent or its agents or employees shall engage in any conduct in the course of its business that constitutes a fraudulent, dishonest, or deceptive practice, whether or not the conduct is prohibited by this subchapter.

(i) No contracts, forms, or schedules used by employment agencies in their dealings with the public shall contain any false, ambiguous, or misleading information.

History. Acts 1975, No. 493, § 15;
A.S.A. 1947, § 81-1027.

11-11-225. Miscellaneous restrictions and requirements.

In addition to other provisions of this subchapter, the following provisions shall govern each and every employment agency:

(1) Every employment agent or agency shall display his, her, or its license in a conspicuous place in the main office of the agency. Managers and counselors shall display their licenses in a conspicuous place in their offices or work areas;

(2)(A) All advertising by an employment agency of any form or kind shall include the words "employment agency" or "personnel agency".

(B) Advertising for an employment position with the agency itself shall clearly convey the information that the job position offered is with the employment agency publishing the advertisement;

(3) No employment agency or its agents or employees shall receive or require any applicant to execute any power of attorney, assignment of wages or salary, or note authorizing the confession of judgment;

(4) No employment agent, by himself or herself, or by his or her agents or employees, shall solicit, persuade, or induce any employee to leave any employment in which the employment agent or his or her agent has placed the employee, nor shall any employment agency or any of its agents or employees solicit, persuade, or induce any employer to discharge any employee, nor shall any employment agent, or his or her agents or employees, divide or offer to divide or share directly or indirectly any fee, charge, or compensation received, or to be received, from an employee with any employer or persons in any way connected with the business thereof;

(5)(A) No employment agent by himself or herself or by his or her agents or employees shall give or promise to give anything of intrinsic value to any employer or applicant for employment as an inducement to use the services of his or her employment agency.

(B) No fee shall be solicited or accepted as an application or registration fee by an employment agent for the purpose of registering any person as an applicant for employment;

(6) No employment agency or its agents or employees shall advertise or make a referral for any job position without having first obtained a bona fide job order therefor;

(7) No employment agency or its agents or employees shall refer an applicant for a job or job interview unless the applicant has been

personally interviewed by the employment agency or its agents or employees or has corresponded with the employment agency with the specific purpose of securing employment through that employment agency;

(8)(A) Every employment agency shall inform the public by a conspicuous sign or poster that the employment agency is subject to the requirements of this subchapter, which is administered and enforced by the Department of Labor.

(B) The department shall prepare and distribute the sign or poster to be used by agencies to comply with this subdivision (8);

(9) No employment agency or its agents or employees shall knowingly send an applicant to any place where a strike, lockout, or other labor dispute exists;

(10) No agency shall use any trade name or business identity similar to, or reasonably likely to be confused with, the trade name or business identity of an existing agency or any governmental nonprofit employment agency;

(11) No employment agency shall refer an applicant to a situation, employment, or occupation prohibited by law;

(12) No employment agency shall charge a fee to an employee for any services other than actual placement of an applicant;

(13) No employment agency shall charge an applicant a fee for accepting employment with the employment agency or any subsidiary of that agency;

(14) Any information regarding an applicant's background or credit, from whatever source obtained, shall be used for no purpose other than assisting the applicant in securing employment. However, an employment agency may use background and credit information regarding an applicant in determining whether to conduct placement services for the applicant if the applicant gives written authorization for securing the information and understands the purpose for which the information is secured;

(15) No employment agency or its agents or employees shall engage in any practice that discriminates against any person on the basis of race, color, sex, age, religion, or national origin;

(16) Under no circumstances shall more than one (1) fee for any one (1) placement be charged any applicant;

(17) No contracts, forms, or schedules used by employment agencies shall contain any provisions in conflict with the provisions of this subchapter; and

(18) All refunds due shall be made by the agency by cash, check, or money order promptly when due.

History. Acts 1975, No. 493, § 16;
A.S.A. 1947, § 81-1028; Acts 1995, No.
283, § 1.

11-11-226. Designation of manager required.

(a) Every employment agency shall designate an agency manager at each office location of that agency, who shall be responsible for the general management, administration, and operation of that office location.

(b) The agency manager must comply with the licensing requirements of §§ 11-11-210 — 11-11-212, 11-11-214, 11-11-217, 11-11-218, 11-11-220(a)(1) and (b), and 11-11-226.

(c) Every employment agency must maintain an agency manager at each of its office locations.

History. Acts 1975, No. 493, § 5; A.S.A. 1947, § 81-1017.

11-11-227. Fee restrictions and requirements.

(a) When employment lasts less than ninety (90) calendar days, regardless of the reason, no employment agency may charge an employee a fee of more than one-ninetieth (1/90th) of the permanent placement fee for each calendar day of the employment. Under no circumstances shall the fee exceed twenty percent (20%) of an employee's actual gross earnings if employment lasts less than thirty (30) days or forty percent (40%) of an employee's actual gross earnings if employment lasts more than thirty (30) days but less than ninety (90) days.

(b)(1) When a promissory note is used by the agency, it shall be clearly identified as such and shall not be executed until the placement is made.

(2) The defense of no or insufficient consideration shall be good as against a holder of any such employment agency fee note.

(c)(1) When a dispute concerning a fee exists, the Department of Labor may conduct an investigation to determine all of the facts concerning the dispute. Thereafter, the Director of the Department of Labor shall issue a decision and order resolving the dispute.

(2) Any person aggrieved by this decision and order may obtain review of this decision and order pursuant to § 11-11-222.

(d)(1) Any schedule of fees to be charged by an employment agency for its services shall be furnished to all applicants upon making application with the agency.

(2)(A) The forms, fee schedules, and contracts utilized by an employment agency shall contain no ambiguous, false, or misleading information.

(B) No contract or fee schedule shall contain smaller than eight point (8 pt.) type.

(e)(1) All fee schedules used in the business of an employment agency must be furnished to job applicants and fee-paying employers and shall state in dollars and cents the amount of any fee charged by the agency for its services.

(2) Percentages shall not be used by agencies in schedules of fees to be charged for their services, except when the annual salary for a job is twelve thousand dollars (\$12,000) or more.

(f) It shall be unlawful for any employment agency to impose, enforce, collect, or receive a fee for performance of any service for a job applicant, or for a prospective employer, unless the agency makes every reasonable effort to disclose the exact dollar amount of the fee to the applicant or prospective employer prior to commencement of employment of an applicant by an employer.

(g) Nothing in this section or this subchapter shall be construed to prohibit an employment agency from contracting with an employer on a fee-paid basis to pay the fee for the placement services for an employee without an actual job placement or to prohibit an agency from charging a fee to an employer for a retained services contract to search for applicants for an employer without an actual job placement.

History. Acts 1975, No. 493, § 12; A.S.A. 1947, § 81-1024; Acts 1995, No. 283, § 2.

11-11-228. Filing of fee schedule, forms, and contracts required.

(a) It shall be the duty of every employment agency to file with the Department of Labor a schedule of all fees, charges, and commissions that the agency expects to charge and collect for its service, together with a copy of all forms and contracts to be used in dealings with the public in the operation of its business.

(b) The fee schedules, contracts, and forms shall be filed with the department on the date of the agency's application for initial or renewal licensing under this subchapter.

(c) Any amendments or supplements to fee schedules, contracts, or forms filed with the department must be filed at least fifteen (15) days before the amendment or supplement is to become effective.

(d) It shall be unlawful for any employment agency to charge, demand, collect, or receive a greater compensation for any service performed by the agency than is specified in fee schedules filed with the department or than is specified by this subchapter.

History. Acts 1975, No. 493, § 12; A.S.A. 1947, § 81-1024.

11-11-229. Records required.

(a) It shall be the duty of every employment agency to keep a complete record of all orders for employees that are received from prospective employers. This record shall contain the date when the order was received, the name and address of the employer seeking the services of an employee, the name of the individual placing the order, the duties of the position to be filled, the qualifications required of the

employee, the salary or wages to be paid, and the probable duration of the job.

(b) It shall be the duty of every employment agency to keep a complete record of each applicant who is referred by the agency to an employer for a job interview. This record shall contain the date when the applicant was referred to a prospective employer for a job or interview, the name of the applicant, and the name of the firm to whom the applicant is referred.

(c)(1) It shall be the duty of every employment agency to keep a complete register called a "business transaction record", which shall consist of the name of the individual placed, the date of the placement, the name of the employer, the starting date of the position, the starting salary, the amount of the fee charged, and the remarks column.

(2) The remarks column will state the amount of any adjustment or refund made.

(d)(1) Prior to referral of any person to a job or interview or prior to placement of any job advertisement, an employment agency must have a current bona fide job order.

(2) It shall be the duty of every employment agency to maintain a copy of any job advertisement and the job order pertaining to any advertisement in a readily available record.

(e) All of the records listed in this section shall be kept in the employment agency office and shall be open during office hours to inspection by the Department of Labor and its duly authorized agents.

(f) No employment agent or his or her employee shall knowingly make any false entry or omission in the records.

History. Acts 1975, No. 493, § 11;
A.S.A. 1947, § 81-1023.

CASE NOTES

Duty of Care.
Duty of care found due to prospective employee. *Keck v. American Emp. Agency,*
Inc., 279 Ark. 294, 652 S.W.2d 2, 41 A.L.R.4th 523 (1983).

CHAPTER 12

EMPLOYMENT OF CHILDREN IN ENTERTAINMENT
INDUSTRY

SECTION.
11-12-101. Purpose.
11-12-102. Definitions.
11-12-103. Penalty.

SECTION.
11-12-104. Restrictions on employment.
11-12-105. Implementation and enforcement.

Effective Dates. Acts 1987, No. 647, § 7: Apr. 4, 1987. Emergency clause provided: "It is hereby found and determined

by the General Assembly that there is an immediate need to allow for the employment of children in the entertainment

industry and to establish conditions for their employment. Therefore, an emergency is declared to exist, and this Act being necessary for immediate preservation of the public peace, health and safety, shall be in full force and effect from and after its passage and approval.”

RESEARCH REFERENCES

ALR. Workers’ compensation statute as barring illegally employed minor’s tort action, 77 A.L.R.4th 844.	C.J.S. 43 C.J.S. Infants, §§ 99, 166. 51 C.J.S. Lab. Rel. §§ 3, 4.
Am. Jur. 48A Am. Jur. 2d, Lab. Rel., §§ 1031, 1032, 1085-1087, 1333.	

11-12-101. Purpose.

The General Assembly finds that the employment of minor children in the entertainment industry is necessary to create realistic theatrical, motion picture, radio, and television productions and to promote industry and economic growth. The purpose of this chapter is to provide minor children and the community with opportunities in the entertainment industry not heretofore provided.

History. Acts 1987, No. 647, § 1.

11-12-102. Definitions.

- As used in this chapter, unless the context otherwise requires:
- (1) “Director” means the Director of the Department of Labor;
 - (2) “Employ” means to use the services of an individual in any remunerative occupation; and
 - (3) “Entertainment industry” means any individual, partnership, corporation, association, or group of persons using the services of a child under sixteen (16) years of age in motion picture productions, television or radio productions, theatrical productions, modeling productions, horse shows, rodeos, and musical performances.

History. Acts 1987, No. 647, § 2.

11-12-103. Penalty.

- (a) Any person, firm, corporation, or association who violates a provision of this chapter or a lawful regulation promulgated under this chapter shall be liable for a civil penalty in accordance with the provisions of § 11-6-103.
- (b)(1) Any person who willfully or intentionally violates the provisions of this chapter or a lawful regulation promulgated under this chapter is guilty of a misdemeanor and upon conviction shall be punished by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment for not more than thirty (30) days, or by both a fine and imprisonment.

(2) Each day that the violation continues shall be deemed a separate offense.

History. Acts 1987, No. 647, § 5; 1991, No. 509, § 2.

11-12-104. Restrictions on employment.

(a) A child under sixteen (16) years of age may be employed in the entertainment industry, and the provisions of §§ 11-6-101 — 11-6-111, with respect to child labor, shall not be applicable to the employment of child actors as authorized in this chapter.

(b) No child under sixteen (16) years of age may be employed in the entertainment industry:

(1) In a role or in an environment deemed to be hazardous or detrimental to the health, morals, education, or welfare of the child as determined by the Director of the Department of Labor;

(2) When the child is required to use a dressing room that is simultaneously occupied by an adult or by other children of the opposite sex;

(3) When the child is not provided with a suitable place to rest or play;

(4) When the parent or guardian of the child is prevented from being present at the scene of employment during all the times the child is working;

(5) When the parent or guardian of the child is prevented from being within sight and sound of the child; and

(6) Without a permit issued by the director and the written consent of the child's parent or guardian for the issuance of the permit.

History. Acts 1987, No. 647, § 3.

11-12-105. Implementation and enforcement.

The Director of the Department of Labor shall have the authority to:

(1) Promulgate rules and regulations for the implementation of this chapter;

(2) Suspend or revoke a permit for the employment of a child in the entertainment industry for cause;

(3) Enter or authorize his or her representative to enter and inspect any place of employment where children work, rest, or play; and

(4) Otherwise enforce and implement the provisions of this chapter.

History. Acts 1987, No. 647, § 4.

CHAPTER 13

ARKANSAS CONSERVATION CORPS ACT

SECTION.

11-13-101. Title.

SECTION.

11-13-102. Definitions.

(10) “State agencies” means the Arkansas Economic Development Council, the Department of Arkansas Heritage, the Department of Correction, the Department of Education, the Department of Higher Education, the Department of Human Services, the Department of Labor, the Department of Parks and Tourism, the Arkansas Department of Environmental Quality, the Department of Workforce Services, the Arkansas State Game and Fish Commission, the State Military Department, and the Arkansas Department of Emergency Management; and

(11) “Work experience projects” means projects established pursuant to the authority granted in this chapter that provide corpsmembers with educational opportunities and job training skills, which may include general educational development, literacy training, adult basic education, job search skills, and job application skills, and with work experience related to the conservation, improvement, or development of natural resources or the enhancement, preservation, and maintenance of public lands, waters, or facilities.

History. Acts 1993, No. 1232, § 2;
1997, No. 540, § 15; 1999, No. 646, § 3;
1999, No. 1164, § 119.

11-13-103. Creation — Rules and regulations.

(a) There is hereby created within the Department of Labor the Arkansas Conservation Corps.

(b) The department shall have the power and authority to promulgate such rules and regulations as are necessary to facilitate the implementation and administration of this chapter.

History. Acts 1993, No. 1232, §§ 3, 15.

11-13-104. Duties of director.

The Director of the Department of Labor shall:

- (1) Enroll eligible participants in work experience projects;
- (2) Employ crewleaders;
- (3) Appoint an administrative officer of the corps who shall employ staff necessary to implement the provisions of this chapter;
- (4) Develop program guidelines or regulations as he or she deems necessary to fairly and effectively administer this chapter;
- (5) Develop or review proposed work experience projects submitted to the Department of Labor by state and local agencies, and approve projects that meet the requirements of this chapter;
- (6) Ensure that work experience projects involve labor-intensive improvement activities on public lands or facilities that will result in a future public value or have a potential for future revenue yield;
- (7) Authorize utilization of the corps for approved work experience projects in urban, suburban, and rural areas as necessary to carry out the provisions of this chapter;

(8) Authorize utilization of the corps for emergency projects within or outside this state that shall include, but not be limited to, natural disasters, fire prevention and suppression, and rescue of lost or injured persons;

(9) Authorize the exchange of corpsmembers and crewleaders with other established conservation corps or service programs in order to foster a spirit of understanding and to advance the goals of volunteerism and service;

(10) Execute contracts with state, local, and community-based agencies containing any terms and conditions deemed necessary and desirable for the enrollment of corpsmembers in approved work experience projects, and, in the case of job search skills, job application skills, and ability assessments, execute contracts or cooperative agreements with federal, state, or local agencies, persons, firms, partnerships, associations, or corporations for the provisions of these services;

(11) Execute contracts for enrollment of corpsmembers in cities of the first class for projects designed to repel or remove graffiti or other vandalism. The director may contract directly with community-based agencies that shall be eligible for funding provided pursuant to this chapter;

(12) Purchase, rent, or otherwise acquire or obtain personal property, supplies, instruments, tools, equipment, or conveniences necessary to complete work experience projects or provide corpsmember training; and

(13)(A) Apply for and accept grants or contributions of funds from any public or private source, including the acceptance of federal funds appropriated by the General Assembly.

(B) Such funds shall include federal funds that may be provided under the National and Community Service Act of 1990.

History. Acts 1993, No. 1232, § 4. tion, is codified primarily as 42 U.S.C.
U.S. Code. The National and Commu- § 12501 et seq.
nity Service Act, referred to in this sec-

11-13-105. Human service projects.

(a)(1) The Director of the Department of Labor may develop state and local human service projects that combine both conservation work and human services, especially those projects and activities that promote the social well-being or economic self-sufficiency of the elderly, persons with physical or developmental disabilities, children, or other persons with low incomes.

(2) The director shall give preference to those human service projects that involve intergenerational activities between corpsmembers and older persons in projects that are in other ways consistent with this chapter.

(b) The director may develop and carry out signature projects involving more than one (1) crew and designed to have a high impact. These

projects shall be short term and may involve working with local or community-based agencies.

(c)(1)(A) Projects developed may include fee-for-service projects with other state and local agencies and community-based agencies.

(B) Fees received from fee-for-service projects shall be deposited into the State Treasury as special revenues credited to the Department of Labor Fund Account, there to be used solely for the purpose of implementing this chapter.

(2) Fee-for-service projects may not be entered into with for-profit agencies, nor may any fee-for-service project displace any other workers.

History. Acts 1993, No. 1232, § 5.

11-13-106. Work experience projects.

(a) Work experience projects shall be undertaken in urban, suburban, and rural areas and shall be selected on the basis of the environmental and natural resource benefits each offers, the opportunities for public use each offers, the educational opportunities and on-the-job training value of each, the future public value of the completed project, the estimated additional revenue to be generated for the state or its subdivisions from the completion of each project, and the savings in other public expenditures that are provided by virtue of the project.

(b)(1) All work experience projects developed or approved and funded by the Department of Labor shall be limited to public lands and facilities except when a property involving other lands will provide documented public value or benefit.

(2) The reimbursement will be retained by the department for use in the corps program.

(3) In the case of emergencies and natural disasters, projects may take place on land or at facilities not owned by the department, other state agencies, or local agencies without regard to public benefit and private reimbursement.

(c)(1)(A) Whenever available and appropriate, adult education, job training, and placement services provided through other federal, state, and local funded programs such as the Job Training Partnership Act [repealed] program, the Community Services Block Grant program, and the Department of Workforce Services shall be coordinated with projects developed under this chapter to assist eligible participants.

(B) Coordinated services may include, but are not limited to, job placement assistance, adult literacy training, job search skills, job application skills, and ability assessments.

(C) Whenever possible, eligible participants without a high school diploma shall receive coordinated services that provide an opportunity to obtain a high school equivalency diploma.

(2) Job training may be provided directly by the agency administering the work experience project or by other agencies as provided in this chapter.

(d)(1) Work sites of work experience projects shall conform to state and federal health and safety standards.

(2) Work experience shall not include the removal or cleaning up of any toxic waste or other hazardous substance.

(e)(1) Corpsmember participation in emergency projects and exchange projects shall be voluntary.

(2) Corpsmembers shall receive adequate training prior to participating in an emergency project.

History. Acts 1993, No. 1232, § 7.

The Community Services Block Grant

U.S. Code. The Job Training Partnership Act, primarily codified as 29 U.S.C. § 1501 et seq., has been repealed.

Act is codified as 42 U.S.C. § 9901 et seq.

11-13-107. Participation.

(a) Persons participating in the Arkansas Conservation Corps program shall be persons who:

(1) Are between the ages of sixteen (16) and twenty-five (25);

(2) Have been residents of the state for at least six (6) months prior to participating in the program;

(3) Are registered with the local office of the Department of Workforce Services for employment;

(4) Are physically and mentally capable of performing labor-intensive work; and

(5) Are able to provide assurance that they did not leave school for the purpose of participating in the program.

(b) Preference in hiring and enrolling corpsmembers in the corps shall be given to economically disadvantaged persons, especially those eligible applicants who receive public assistance grants, general relief, Aid To Families With Dependent Children, or other public assistance benefits.

(c)(1)(A) Eligibility for corpsmembers shall be determined by the Department of Workforce Services, which shall refer eligible participants to the Department of Labor by order of classification.

(B) For referral purposes, the Department of Workforce Services shall develop standards for classifying applicants into various levels of eligibility based on the degree to which an applicant is economically disadvantaged.

(2) The Department of Workforce Services shall seek referrals from schools, local agencies, community-based agencies, and other youth and human service organizations for purposes of enrolling applicants in corps programs.

(3) If the number of corps jobs is insufficient to employ all eligible individuals who apply for participation in the program, the Department of Workforce Services may provide the names of those eligible individuals to private-sector employers or to job training programs requesting

referrals, so long as the individuals referred agree to the referral's being provided.

History. Acts 1993, No. 1232, § 8.

11-13-108. Service — Compensation.

(a)(1) Corpsmembers of the Arkansas Conservation Corps shall be enrolled for a period of six (6) months.

(2) At the option of the Department of Labor, corpsmembers who have successfully completed their six-month term may be enrolled for a second six-month term.

(b)(1)(A) Corpsmembers shall be scheduled to work the standard work hours of the Department of Labor or of the state or local agency sponsoring the work experience project.

(B) In no instance shall corpsmembers be scheduled to work more than forty (40) hours per week.

(2) Corpsmembers shall be excused as necessary, as determined by the department, from scheduled work hours to participate in adult education, job training, corpsmember development, and placement services that the Department of Labor determines to be appropriate and in accordance with the provisions of this chapter.

(3) Corpsmembers shall be compensated as set forth in subdivision (c)(1) of this section for participating in job training and placement services that the Department of Labor determines are in accordance with the provisions of this chapter.

(c)(1) Corpsmembers shall receive an hourly wage no less than the state minimum wage as provided for by the Minimum Wage Act of the State of Arkansas, § 11-4-201 et seq.

(2) Corpsmembers serving a second six-month term shall receive additional hourly compensation of at least ten percent (10%).

(3) Corpsmembers who complete six (6) months in the corps are entitled to a five-hundred-dollar bonus.

(4) Corpsmembers who complete twelve (12) months in the program are entitled to an additional five-hundred-dollar bonus at the end of their second six (6) months in the program.

(d) Corpsmembers shall not be entitled to any employee benefits provided to existing employees of the Department of Labor or other agencies except for paid state holidays and workers' compensation coverage, which shall be provided through the funds appropriated to carry out this chapter, nor shall service as a corpsmember qualify an individual for benefits under the Department of Workforce Services Law, § 11-10-101 et seq.

(e)(1) The Department of Labor shall refer the names of corpsmembers who successfully complete their service in the corps to the Department of Workforce Services for assistance in securing private-sector employment or for enrollment in additional job training programs.

(2) The Department of Labor may also provide the names of participants who successfully complete their service in the corps to private-

sector employers requesting referrals, with the approval of the participant.

History. Acts 1993, No. 1232, § 9.

11-13-109. Crewleaders.

(a) Funds available for the Arkansas Conservation Corps may be expended to pay the wages of crewleaders who shall supervise corpsmembers as prescribed by the Department of Labor.

(b) Persons eligible to be hired as crewleaders by the Department of Labor shall be men or women who:

(1) Have been residents of the state for at least six (6) months prior to employment in the program;

(2) Are registered with the local office of the Department of Workforce Services for employment;

(3) Are physically and mentally capable of performing labor-intensive work and supervisory duties; and

(4) Are not attending a postsecondary institution full time, and who provide assurance that they did not leave school for the purpose of employment as a supervisor in the program.

(c) In the hiring of crewleaders, preference shall be given to honorably discharged veterans of the United States armed forces.

(d) Crewleaders may be employed by the Department of Labor for a period that may exceed the six-month limit established for corpsmembers.

(e) Crewleaders shall receive an hourly wage that exceeds the minimum hourly wage of corpsmembers by a minimum of five dollars (\$5.00).

(f) Crewleaders shall not be entitled to any employee benefits provided to existing employees of the Department of Labor or of other state or local agencies except for paid state holidays and workers' compensation coverage, which shall be provided through the funds appropriated to carry out this chapter.

History. Acts 1993, No. 1232, § 10.

11-13-110. Employment practices.

(a) The Director of the Department of Labor, in developing and approving projects, shall assure that:

(1) In employment practices, no individual will be discriminated against because of the individual's race, color, religious creed, ancestry, sex, national origin, or non-job-related handicap or disability;

(2) No person shall make any payment to any other person as compensation for referring an individual as a potential corpsmember; and

(3) Work available to participants will not be available due to a labor dispute, strike, or lockout and shall not be assigned so as to cause a

layoff or downgrading or to prevent the return to work of an available competent employee.

(b)(1) It shall be unlawful for anyone to demand from any public officer, corpsmember, or crewleader any assessment of percentage of any money or profit, or its equivalent in support, service, or any other thing of value, with the understanding, express or implied, that the same may be used or shall be used for political purposes.

(2) Nothing contained in this chapter shall be construed to prohibit voluntary contributions to any political committee or organization for legitimate political and campaign purposes to the extent that the contributions are not prohibited by law.

History. Acts 1993, No. 1232, §§ 6, 11.

11-13-111. Applicability to federal law.

In order to permit joint projects with the summer youth employment and training program established pursuant to Title II B of the Job Training Partnership Act [repealed], the provisions of this chapter not consistent with the Job Training Partnership Act [repealed] are hereby waived for such joint projects.

History. Acts 1993, No. 1232, § 13. ship Act, primarily codified as 29 U.S.C.
U.S. Code. The Job Training Partner- § 1501 et seq., has been repealed.

11-13-112. Funding.

In order to provide opportunities for local and community-based agencies to create a locally operated and funded conservation corps, funds may be authorized to support the development of new local corps programs consistent with the provisions of this chapter.

History. Acts 1993, No. 1232, § 14.

11-13-113. Annual report.

(a)(1) On January 1, 1994, and each year thereafter during the existence of the Arkansas Conservation Corps, the Director of the Department of Labor shall report to the Legislative Council on the preceding fiscal year's impact of the program. All recipients of funds for approved projects shall provide the information requested by the Department of Labor for the purposes of this report.

(b) The report shall include but not be limited to:

- (1) Productivity measures by the type of project funded;
- (2) The number of corpsmembers enrolled;
- (3) The average length of enrollment;
- (4) The extent of job training provided to participants;
- (5) The number of participants who find employment after completion of the project;
- (6) The estimated total dollar value of completed work projects;

- (7) The estimated potential revenue from projects completed by corpsmembers;
- (8) The estimated amount of dollar benefits in excess of dollar costs resulting from the program; and
- (9) The amount of appropriated funds expended on program administration.

History. Acts 1993, No. 1232, § 12.

CHAPTER 14

VOLUNTARY PROGRAM FOR DRUG-FREE
WORKPLACES

SECTION.	SECTION.
11-14-101. Legislative intent.	grounds of voluntary treatment prohibited.
11-14-102. Definitions.	
11-14-103. Applicability.	11-14-108. Drug or alcohol use not handicap or disability — Drug or alcohol use cause for firing or failure to hire — Miscellaneous provisions.
11-14-104. Testing for drugs or alcohol authorized — Conditions for testing — Effect of failure to comply.	11-14-109. Confidentiality of records.
11-14-105. Written policy statement.	11-14-110. Licensure of testing laboratory.
11-14-106. Required drug or alcohol tests.	11-14-111. Rules and regulations.
11-14-107. Testing subject to United States Department of Transportation procedures — Verification — Chain of custody procedures — Costs — Discrimination on	11-14-112. Rating plans based on drug-free workplace program participation.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: “Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall im-

pliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001.”

11-14-101. Legislative intent.

(a) It is the intent of the General Assembly to promote drug-free workplaces in order that employers in this state may be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work-related accidents resulting from drug or alcohol abuse by employees. It is further the intent of the General Assembly that drug and alcohol abuse be discouraged and that employees who choose to engage in drug or alcohol abuse face the risk of unemployment and the forfeiture of workers’ compensation benefits.

(b) If an employer implements a drug-free workplace program in accordance with this chapter that includes notice, education, and procedural requirements for testing for drugs and alcohol pursuant to rules developed by the Workers' Health and Safety Division of the Workers' Compensation Commission, the covered employer may require the employee to submit to a test for the presence of drugs or alcohol, and if a drug or alcohol is found to be present in the employee's system at a level prescribed by statute or by rule adopted pursuant to this chapter as excessive, the employee may be terminated and may be precluded from workers' compensation medical and indemnity benefits. However, a drug-free workplace program must require the covered employer to notify all employees that it is a condition of employment for an employee to refrain from reporting to work or working with the presence of drugs or alcohol in the employee's body, and if an injured employee refuses to submit to a test for drugs or alcohol, the employee may be precluded from workers' compensation medical and indemnity benefits. In the event of termination, an employee shall be entitled to contest the test results before the Department of Labor.

History. Acts 1999, No. 1552, § 1; 2001, No. 1757, § 9.

A.C.R.C. Notes. Acts 2001, No. 1757, § 12, provided: "All laws and parts of laws

expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999."

11-14-102. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Alcohol" has the same meaning in this chapter as when used in the federal regulations describing the procedures used for the testing of alcohol by programs operating pursuant to the authority of the United States Department of Transportation, currently compiled at 49 C.F.R. Part 40;

(2) "Alcohol test" means an analysis of breath or blood or any other analysis that determines the presence and level or absence of alcohol as authorized by the United States Department of Transportation in its rules and guidelines concerning alcohol testing and drug testing;

(3) "Chain of custody" refers to the methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances and providing for accountability at each stage in handling, testing, and storing specimens and reporting test results;

(4) "Confirmation test", "confirmed test", or "confirmed drug or alcohol test" means a second analytical procedure used to identify the presence of a specific drug or alcohol or metabolite in a specimen, which test must be different in scientific principle from that of the initial test procedure and must be capable of providing requisite specificity, sensitivity, and quantitative accuracy;

(5) "Covered employer" means a person or entity that employs a person, is covered by the Workers' Compensation Law, § 11-9-101 et seq., maintains a drug-free workplace pursuant to this chapter, and

includes on the posting required by § 11-14-105 a specific statement that the policy is being implemented pursuant to the provisions of this chapter. This chapter shall have no effect on employers who do not meet this definition;

(6) “Director” means the Director of the Workers’ Health and Safety Division of the Workers’ Compensation Commission;

(7) “Division” means the Workers’ Health and Safety Division of the Workers’ Compensation Commission;

(8) “Drug” means any controlled substance subject to testing pursuant to drug testing regulations adopted by the United States Department of Transportation. A covered employer shall test an individual for all such drugs in accordance with the provisions of this chapter. The director may add additional drugs by rule in accordance with § 11-14-111;

(9) “Drug or alcohol rehabilitation program” means a service provider that provides confidential, timely and expert identification, assessment, and resolution of employee drug or alcohol abuse;

(10) “Drug test” or “test” means any chemical, biological, or physical instrumental analysis administered by a laboratory authorized to do so pursuant to this chapter for the purpose of determining the presence or absence of a drug or its metabolites pursuant to regulations governing drug testing adopted by the United States Department of Transportation or such other recognized authority approved by rule by the director;

(11) “Employee” means any person who works for salary, wages, or other remuneration for a covered employer;

(12)(A) “Employee assistance program” means an established program capable of:

(i) Providing expert assessment of employee personal concerns;

(ii) Confidential and timely identification services with regard to employee drug or alcohol abuse;

(iii) Referrals of employees for appropriate diagnosis, treatment, and assistance; and

(iv) Follow-up services for employees who participate in the program or require monitoring after returning to work.

(B) If, in addition to the above activities, an employee assistance program provides diagnostic and treatment services. These services shall in all cases be provided by the program;

(13) “Employer” means a person or entity that employs a person and that is covered by the Workers’ Compensation Law, § 11-9-101 et seq.;

(14) “Initial drug or alcohol test” means a procedure that qualifies as a screening test or initial test pursuant to regulations governing drug or alcohol testing adopted by the United States Department of Transportation or such other recognized authority approved by rule by the director;

(15) “Job applicant” means a person who has applied for a position with a covered employer, who has been offered employment conditioned upon successfully passing a drug or alcohol test and who may have begun work pending the results of the drug or alcohol test;

(16) "Medical review officer" means a licensed physician, pharmacist, pharmacologist or similarly qualified individual employed with or contracted with a covered employer who:

(A) Has knowledge of substance abuse disorders, laboratory testing procedures, and chain of custody collection procedures;

(B) Verifies positive, confirmed test results; and

(C) Has the necessary medical training to interpret and evaluate an employee's positive test result in relation to the employee's medical history or any other relevant biomedical information;

(17) "Reasonable-suspicion drug testing" means drug or alcohol testing based on a belief that an employee is using or has used drugs or alcohol in violation of the covered employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon:

(A) Observable phenomena while at work such as direct observation of drug or alcohol use or of the physical symptoms or manifestations of being under the influence of a drug or alcohol;

(B) Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance;

(C) A report of drug or alcohol use provided by a reliable and credible source;

(D) Evidence that an individual has tampered with a drug or alcohol test during employment with the current covered employer;

(E) Information that an employee has caused, contributed to, or been involved in an accident while at work; or

(F) Evidence that an employee has used, possessed, sold, solicited, or transferred drugs or used alcohol while working or while on the covered employer's premises or while operating the covered employer's vehicle, machinery, or equipment;

(18) "Safety-sensitive position" means a position involving a safety-sensitive function pursuant to regulations governing drug or alcohol testing adopted by the United States Department of Transportation. For drug-free workplaces, the director is authorized to promulgate rules expanding the scope of "safety-sensitive position" to cases where impairment may present a clear and present risk to co-workers or other persons. "Safety-sensitive position" means, with respect to any employer:

(A) A position in which a drug or alcohol impairment constitutes an immediate and direct threat to public health or safety, such as a position that requires the employee to:

(i) Carry a firearm;

(ii) Perform life-threatening procedures;

(iii) Work with confidential information or documents pertaining to criminal investigations; or

(iv) Work with controlled substances; or

(B) A position in which a momentary lapse in attention could result in injury or death to another person; and

(19) “Specimen” means tissue, fluid, or a product of the human body capable of revealing the presence of alcohol or drugs or their metabolites.

History. Acts 1999, No. 1552, § 3; 2001, No. 1757, § 10.

A.C.R.C. Notes. Acts 2001, No. 1757, § 9, provided in part: “Nothing in the act, which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by

this act, which originated as House Bill 2646 of 2001.”

Acts 2001, No. 1757, § 12, provided: “All laws and parts of laws expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999.”

11-14-103. Applicability.

(a) This chapter applies to a drug-free workplace program implemented pursuant to rules adopted by the Director of the Workers’ Health and Safety Division of the Workers’ Compensation Commission.

(b) The application of the provisions of this chapter is subject to the provisions of any applicable collective bargaining agreement.

(c) Nothing in the program authorized by this chapter is intended to authorize any employer to test any applicant or employee for alcohol or drugs in any manner inconsistent with federal constitutional or statutory requirements, including those imposed by the Americans with Disabilities Act and the National Labor Relations Act.

History. Acts 1999, No. 1552, § 2.

U.S. Code. The Americans with Disabilities Act, referred to in this section, is codified primarily as 42 U.S.C. § 12101 et

seq. The National Labor Relations Act, referred to in this section, is codified as 29 U.S.C. § 151 et seq.

11-14-104. Testing for drugs or alcohol authorized — Conditions for testing — Effect of failure to comply.

(a)(1) A covered employer may test a job applicant for alcohol or for any drug described in § 11-14-102. Provided, for public employees such testing shall be limited to the extent permitted by the Arkansas Constitution and the United States Constitution. A covered employer may test an employee for any drug and at any time as set out in § 11-14-106. An employee who is not in a safety-sensitive position may be tested for alcohol only when the test is based upon reasonable suspicion. An employee in a safety-sensitive position may be tested for alcohol use at any occasion described in §§ 11-14-102 — 11-14-105, inclusive.

(2) In order to qualify as having established a drug-free workplace program that affords a covered employer the ability to qualify for the discounts provided under § 11-14-112, all drug or alcohol testing conducted by covered employers shall be in conformity with the standards and procedures established in this chapter and all applicable rules adopted pursuant to this chapter. If a covered employer fails to maintain a drug-free workplace program in accordance with the standards and procedures established in this section and in applicable

rules, the covered employers shall not be eligible for discounts under § 11-14-112. All covered employers qualifying for and receiving discounts provided under § 11-14-112 must be reported annually by the insurer to the Director of the Workers' Health and Safety Division of the Workers' Compensation Commission.

(b) The director shall adopt a form pursuant to rule-making authority, which form shall be used by the employer to certify compliance with the provisions of this chapter. Substantial compliance in completing and filing the form with the director shall create a rebuttable presumption that the employer has established a drug-free workplace program and is entitled to the protection and benefit of this chapter. Prior to granting any premium credit to an employer pursuant to § 11-14-112, all insurers shall obtain the form from the employer.

(c) It is intended that any employer required to test its employees pursuant to the requirements of any federal statute or regulation shall be deemed to be in conformity with this section as to the employees it is required to test by those standards and procedures designated in that federal statute or regulation. All other employees of the employer shall be subject to testing as provided in this chapter in order for the employer to qualify as having a drug-free workplace program.

History. Acts 1999, No. 1552, § 4.

11-14-105. Written policy statement.

(a) One (1) time only prior to testing, a covered employer shall give all employees and job applicants for employment a written policy statement that contains:

(1) A general statement of the covered employer's policy on employee drug or alcohol use, which must identify:

(A) The types of drug or alcohol testing an employee or job applicant may be required to submit to, including reasonable-suspicion drug or alcohol testing or drug or alcohol testing conducted on any other basis; and

(B) The actions the covered employer may take against an employee or job applicant on the basis of a positive confirmed drug or alcohol test result;

(2) A statement advising the employee or job applicant of the existence of this section;

(3) A general statement concerning confidentiality;

(4) Procedures for employees and job applicants to confidentially report the use of prescription or nonprescription medications to a medical review officer after being tested, but only if the testing process has revealed a positive result for the presence of alcohol or drug use;

(5) The consequences of refusing to submit to a drug or alcohol test;

(6) A representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug or alcohol rehabilitation programs;

(7) A statement that:

(A) An employee or job applicant who receives a positive confirmed test result may contest or explain the result to the medical review officer within five (5) working days after receiving written notification of the test result;

(B) If an employee's or job applicant's explanation or challenge is unsatisfactory to the medical review officer, the medical review officer shall report a positive test result back to the covered employer; and

(C) A person may contest the drug or alcohol test result pursuant to rules adopted by the Workers' Health and Safety Division of the Workers' Compensation Commission;

(8) A statement informing the employee or job applicant of the employee's responsibility to notify the laboratory of any administrative or civil action brought pursuant to this section;

(9) A list of all drug classes for which the employer may test;

(10) A statement regarding any applicable collective bargaining agreement or contract and any right to appeal to the applicable court;

(11) A statement notifying employees and job applicants of their right to consult with a medical review officer for technical information regarding prescription or nonprescription medication; and

(12) A statement complying with the requirements for notice under § 11-14-101.

(b) A covered employer shall ensure that at least sixty (60) days elapse between a general one-time notice to all employees that a drug-free workplace program is being implemented and the effective date of the program.

(c) A covered employer shall include notice of drug and alcohol testing on vacancy announcements for positions for which drug or alcohol testing is required. A notice of the covered employer's drug and alcohol testing policy must also be posted in an appropriate and conspicuous location on the covered employer's premises, and copies of the policy must be made available for inspection by the employees or job applicants of the covered employer during regular business hours in the covered employer's personnel office or other suitable locations.

(d) Subject to any applicable provisions of a collective bargaining agreement or any applicable labor law, a covered employer may rescind its coverage under this chapter by posting a written and dated notice in an appropriate and conspicuous location on its premises. The notice shall state that the policy will no longer be conducted pursuant to this chapter. The employer shall also provide sixty (60) days' written notice to the employer's workers' compensation insurer of the rescission. As to employees and job applicants, the rescission shall become effective no earlier than sixty (60) days after the date of the posted notice.

(e) The Director of the Workers' Health and Safety Division of the Workers' Compensation Commission shall develop a model notice and policy for drug-free workplace programs.

which originated as House Bill 2646 of 2001, nor in Act 1552 of 1999 shall impliedly repeal any part of Act 796 of 1993. Act 796 of 1993 is expressly reaffirmed by this act, which originated as House Bill 2646 of 2001.”

Acts 2001, No. 1757, § 12, provided: “All laws and parts of laws expressly in conflict with this act are repealed. No part of Act 796 of 1993 shall be impliedly repealed by this act or Act 1552 of 1999.”

11-14-106. Required drug or alcohol tests.

(a) To the extent permitted by law, a covered employer who voluntarily establishes a drug-free workplace is required to conduct the following types of drug or alcohol tests:

(1) **JOB APPLICANT DRUG AND ALCOHOL TESTING.** A covered employer must require job applicants to submit to a drug test after a conditional offer of employment and may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusing to hire a job applicant. An employer may test job applicants for alcohol, but is not required to, after a conditional offer of employment. Limited testing of applicants, only if it is based on a reasonable classification basis, is permissible in accordance with a Workers’ Health and Safety Division of the Workers’ Compensation Commission rule;

(2) **REASONABLE-SUSPICION DRUG AND ALCOHOL TESTING.** A covered employer must require an employee to submit to reasonable-suspicion drug or alcohol testing. A written record shall be made of the observations leading to a controlled-substances reasonable suspicion test within twenty-four (24) hours of the observed behavior or before the results of the test are released, whichever is earlier. A copy of this documentation shall be given to the employee upon request, and the original documentation shall be kept confidential by the covered employer pursuant to § 11-14-109 and shall be retained by the covered employer for at least one (1) year;

(3) **ROUTINE FITNESS-FOR-DUTY DRUG TESTING.**

(A) A covered employer shall require an employee to undergo drug or alcohol testing, if as a part of the employer’s written policy, the test is conducted as a routine part of a routinely scheduled employee fitness-for-duty medical examination or is scheduled routinely for all members of an employment classification or group. Provided, a public employer may require scheduled, periodic testing only of employees who:

- (i) Are police or peace officers;
- (ii) Have drug interdiction responsibilities;
- (iii) Are authorized to carry firearms;
- (iv) Are engaged in activities that directly affect the safety of others;
- (v) Work in direct contact with inmates in the custody of the Department of Correction; or
- (vi) Work in direct contact with minors who have been adjudicated delinquent or who are in need of supervision in the custody of the Department of Human Services.

(B) This subdivision does not require a drug or alcohol test if a covered employer's personnel policy on July 1, 2000, does not include drug or alcohol testing as part of a routine fitness-for-duty medical examination. The test shall be conducted in a nondiscriminatory manner. Routine fitness-for-duty drug or alcohol testing of employees does not apply to volunteer employee health screenings, employee wellness programs, programs mandated by governmental agencies, or medical surveillance procedures that involve limited examinations targeted to a particular body part or function;

(4) **FOLLOW-UP DRUG TESTING.** If the employee in the course of employment enters an employee assistance program for drug-related or alcohol-related problems or a drug or alcohol rehabilitation program, the covered employer must require the employee to submit to a drug or alcohol test, as appropriate, as a follow-up to the program, unless the employee voluntarily entered the program. In those cases, the covered employer has the option to not require follow-up testing. If follow-up testing is required, it must be conducted at least one (1) time per year for a two-year period after completion of the program. Advance notice of a follow-up testing date must not be given to the employee to be tested; and

(5) **POST-ACCIDENT TESTING.** After an accident that results in an injury, the covered employer shall require the employee to submit to a drug or alcohol test in accordance with the provisions of this chapter.

(b) This chapter does not preclude an employer from conducting any lawful testing of employees for drugs or alcohol that is in addition to the minimum testing required under this chapter.

History. Acts 1999, No. 1552, § 6.

RESEARCH REFERENCES

ALR. Validity and operation of pre-employment drug testing — State cases. 96 A.L.R.5th 485.

11-14-107. Testing subject to United States Department of Transportation procedures — Verification — Chain of custody procedures — Costs — Discrimination on grounds of voluntary treatment prohibited.

(a) All specimen collection and testing for drugs and alcohol under this chapter shall be performed in accordance with the procedures provided for by the United States Department of Transportation rules for workplace drug and alcohol testing compiled at 49 C.F.R., Part 40.

(b) A covered employer may not discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test and by a medical review officer.

(c) A covered employer that performs drug testing or specimen collection shall use chain-of-custody procedures established by regula-

tions of the United States Department of Transportation or such other recognized authority approved by rule by the Director of the Workers' Health and Safety Division of the Workers' Compensation Commission governing drug testing.

(d) A covered employer shall pay the cost of all drug and alcohol tests, initial and confirmation, that the covered employer requires of employees. An employee or job applicant shall pay the costs of any additional drug or alcohol tests not required by the covered employer.

(e) A covered employer shall not discharge, discipline, or discriminate against an employee solely upon the employee's voluntarily seeking treatment while under the employ of the covered employer for a drug-related or alcohol-related problem if the employee has not previously tested positive for drug or alcohol use, entered an employee assistance program for drug-related or alcohol-related problems, or entered a drug or alcohol rehabilitation program. Unless otherwise provided by a collective bargaining agreement, a covered employer may select the employee assistance program or drug or alcohol rehabilitation program if the covered employer pays the cost of the employee's participation in the program. However, nothing in this chapter is intended to require any employer to permit or provide such a rehabilitation program.

(f) If drug or alcohol testing is conducted based on reasonable suspicion, the covered employer shall promptly detail in writing the circumstances that formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request, and the original documentation shall be kept confidential by the covered employer pursuant to § 11-14-109 and shall be retained by the covered employer for at least one (1) year.

History. Acts 1999, No. 1552, § 7;
2005, No. 1962, § 21.

**11-14-108. Drug or alcohol use not handicap or disability —
Drug or alcohol use cause for firing or failure to hire
— Miscellaneous provisions.**

(a) An employee or job applicant whose drug or alcohol test result is confirmed as positive in accordance with this section shall not by virtue of the result alone be deemed to have a handicap or disability as defined under federal, state, or local handicap and disability discrimination laws.

(b) A covered employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this section is considered to have discharged, disciplined, or refused to hire for cause. Nothing in this chapter shall be construed to amend or affect the employment-at-will doctrine.

(c) No physician-patient relationship is created between an employee or job applicant and a covered employer or any person performing or

evaluating a drug or alcohol test solely by the establishment, implementation, or administration of a drug or alcohol testing program. This section in no way relieves the person performing the test from responsibility for acts of negligence in performing the tests.

(d) Nothing in this section shall be construed to prevent a covered employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs or alcohol, including convictions for offenses relating to drugs or alcohol, and taking action based upon a violation of any of those rules.

(e) This section does not operate retroactively and does not abrogate the right of an employer under state law to lawfully conduct drug or alcohol tests or implement lawful employee drug-testing programs. The provisions of this chapter shall not prohibit an employer from conducting any drug or alcohol testing of employees that is otherwise permitted by law.

(f) If an employee or job applicant refuses to submit to a drug or alcohol test, the covered employer is not barred from discharging or disciplining the employee or from refusing to hire the job applicant. However, this subsection does not abrogate the rights and remedies of the employee or job applicant as otherwise provided in this section.

(g) This section does not prohibit an employer from conducting medical screening or other tests required, permitted, or not disallowed by any statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. The screening or testing is limited to the specific substances expressly identified in the applicable statute, rule, or regulation, unless prior written consent of the employee is obtained for other tests. The screening or testing need not be in compliance with the rules adopted by the Workers' Health and Safety Division of the Workers' Compensation Commission and by the Department of Health. If applicable, such drug or alcohol testing must be specified in a collective bargaining agreement as negotiated by the appropriate certified bargaining agent before such testing is implemented.

(h) No cause of action shall arise in favor of any person based upon the failure of an employer to establish a program or policy for drug or alcohol testing.

History. Acts 1999, No. 1552, § 8.

11-14-109. Confidentiality of records.

(a) All information, interviews, reports, statements, memoranda, and drug or alcohol test results, written or otherwise, received by the covered employer through a drug or alcohol testing program are confidential communications and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings except in accordance with this section or in determining

compensability under this chapter or the Workers' Compensation Law, § 11-9-101 et seq.

(b) Covered employers, laboratories, medical review officers, employee assistance programs, drug or alcohol rehabilitation programs, and their agents who receive or have access to information concerning drug or alcohol test results shall keep all information confidential. Release of such information under any other circumstance is authorized solely pursuant to a written consent form signed voluntarily by the person tested, unless the release is compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this section relevant to a legal claim asserted by the employee or is deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. At a minimum, the consent form must contain:

- (1) The name of the person who is authorized to obtain the information;
- (2) The purpose of the disclosure;
- (3) The precise information to be disclosed;
- (4) The duration of the consent; and
- (5) The signature of the person authorizing release of the information.

(c) Information on drug or alcohol test results for tests administered pursuant to this chapter shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this section is inadmissible as evidence in any such criminal proceeding.

(d) This section does not prohibit a covered employer, agent of such employer, or laboratory conducting a drug or alcohol test from having access to employee drug or alcohol test information or using such information when consulting with legal counsel in connection with actions brought under or related to this section, or when the information is relevant to its defense in a civil or administrative matter. Neither is this section intended to prohibit disclosure among management as is reasonably necessary for making disciplinary decisions relating to violations of drug or alcohol standards of conduct adopted by an employer.

(e) A person who discloses confidential medical records of an employee except as provided in this chapter shall be deemed guilty of a Class C misdemeanor.

History. Acts 1999, No. 1552, § 9;
2005, No. 1962, § 22.

11-14-110. Licensure of testing laboratory.

(a) A laboratory may not analyze initial or confirmation test specimens unless:

- (1) The laboratory is licensed and approved by the Department of Health, using criteria established by the United States Department of

Health and Human Services as guidelines for modeling the state drug-free testing program pursuant to this section, or the laboratory is certified by the United States Department of Health and Human Services, the College of American Pathologists, or such other recognized authority approved by rule by the Director of the Workers' Health and Safety Division of the Workers' Compensation Commission. The Department of Health may license and approve any new laboratory to analyze initial or confirmation test specimens under the provisions of this chapter and may charge a fee not to exceed two thousand dollars (\$2,000) for the license and approval of the new laboratory; and

(2) The laboratory complies with the procedures established by the United States Department of Transportation for a workplace drug test program or such other recognized authority approved by the director.

(3) The fees set forth in this section shall be cash funds of the Department of Health and shall be deposited as provided in § 19-4-801 et seq.

(b) Confirmation tests may be conducted only by a laboratory that meets the requirements of subsection (a) of this section and is certified by either the Substance Abuse and Mental Health Services Administration or the Forensic Urine Testing Accreditation Programs of the College of American Pathologists.

History. Acts 1999, No. 1552, § 10.

11-14-111. Rules and regulations.

(a) The Director of the Workers' Health and Safety Division of the Workers' Compensation Commission is authorized to adopt rules, using criteria established by the United States Department of Health and Human Services and the United States Department of Transportation as guidelines, for modeling the state drug and alcohol testing program, concerning, but not limited to:

(1) Standards for licensing drug and alcohol testing laboratories and suspension and revocation of such licenses;

(2) Body specimens and minimum specimen amounts that are appropriate for drug or alcohol testing;

(3) Methods of analysis and procedures to ensure reliable drug or alcohol testing results, including the use of breathalyzers and standards for initial tests and confirmation tests;

(4) Minimum cut-off detection levels for alcohol, each drug, or metabolites of such drug for the purposes of determining a positive test result;

(5) Chain-of-custody procedures to ensure proper identification, labeling, and handling of specimens tested; and

(6) Retention, storage, and transportation procedures to ensure reliable results on confirmation tests and retests.

(b) The director is authorized to adopt relevant federal rules concerning drug and alcohol testing as a minimum standard for testing procedures and protections. All such rules shall be promulgated in

accordance with the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

(c) The director shall consider drug testing programs and laboratories operating as a part of the Forensic Urine Drug Testing Accreditation Programs of the College of American Pathologists in issuing guidelines or promulgating rules relative to recognized authorities in drug testing.

(d) The director is authorized to set education program requirements for drug-free workplaces by rules promulgated in accordance with the requirements of the Arkansas Administrative Procedure Act, § 25-15-201 et seq. The requirements shall not be more stringent than the federal requirements for workplaces regulated by United States Department of Transportation rules.

History. Acts 1999, No. 1552, § 11.

11-14-112. Rating plans based on drug-free workplace program participation.

The Insurance Commissioner shall approve rating plans for workers' compensation insurance that give specific identifiable consideration in the setting of rates to employers that implement a drug-free workplace program pursuant to rules adopted by the Workers' Health and Safety Division of the Workers' Compensation Commission. The plans must take effect January 1, 2000, must be actuarially sound, and must state the savings anticipated to result from the drug testing. The credit shall be at least five percent (5%) unless the Insurance Commissioner determines that five percent (5%) is actuarially unsound. The Insurance Commissioner is also authorized to develop a schedule of premium credits for workers' compensation insurance for employers who have safety programs that attain certain criteria for safety programs. The Insurance Commissioner shall consult with the Director of the Department of Labor in setting such criteria.

History. Acts 1999, No. 1552, § 12.

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